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BY

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀοθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE ENLIGHTENMENT OF LORD MANSFIELD.

[*Contributed by* The Right Honourable Lord Shaw of Dunfermline]

In one of Duncan Forbes of Culloden's appeal cases in the House of Lords he had a young man as his junior, by name William Murray. I wish there were material to let me figure out the two. The one with a name made in Parliament and in the law; the other with a name to make in both. How did the senior—the fearless, humane, capable, and determined elder—how did he treat, how did he compare with, that junior? The latter was a twenty years younger man, urbane, scholarly, powerful, patient, astute. He was a fellow countryman, a Scot, to be not only the greatest Chief Justice of England but a great maker, if not the greatest maker, of the English Common Law. Did Forbes get a glimpse of the budding greatness of Lord Stormonth's son?

I should doubt that, although Forbes had a direct and penetrating vision. But in a second scene, when they were met together, I feel sure that he must have forecast some of the high range of Murray's eminence. It was in that sorry squabble when Edinburgh, so to speak, defended at the Bar of the House its Lord Provost. It put Murray in as the junior of Forbes in the task of resisting the Bill for the degradation of the City and its Chief Magistrate. To Murray, the junior, from the outside and to Forbes, the senior, from the inside, the job undoubtedly required grit, courage and a real independence. In this common cause surely they must have come to know each other with a mutual and admiring respect. To the one, Forbes, went the Lord Presidency, with an acclaim of gratitude for his past. To the other, Murray, was granted the freedom of Edinburgh, with great expectations for his future.

Yes: Murray was a Scot. This is where the laugh on Lord Chancellor Campbell comes in. I think it must have been of him that people were thinking when the phrase as to a Scot joking with difficulty was coined. You do not know whether his allusions to the manifestly painful subject of his own nationality are of the

nature of a recommendation or an apology. They remind you of the " Beg your pardon, sir," that the waiter at a country ceremony salutes you with, when he fills up your glass with funeral port.

Dr. Johnson, dictatorial as usual, whether right or wrong, was much franker. Says Boswell: " Dr. Johnson would not allow Scotland to derive any credit from Lord Mansfield, as he had been reared in England, observing: ' Much may be made of a Scotchman if he be caught young ! ' "

And the English did catch him pretty young. He was the eleventh child of the family, had done well as a boy at the Grammar School of Perth : what was he to do for a living ? With the makings of a scholar or a literary man in him and with ambitions for the law, yet he could not go off to Leyden or the Low Countries. So he mounted a Galloway pony, went off by Queensferry and the houses of any relatives that he could find on the road, and he made for London and the Westminster School.

Thence with a scholarship to Christchurch, Oxford : and thence to Lincoln's Inn to eat his dinners, to read deeply, both in letters and in law, and to take practice in oratory itself (he had to the end a beautifully modulated voice). So that when business after a few years came to him it came to a gifted and well-endowed mind.

He was from those early years a person of some social and intellectual consideration, enjoying the convivial company of Pope and Bolingbroke, and he put his copious drink into a good skin, arguing with the best. In society he had powerful friends. Among them the famous Sarah, Duchess of Marlborough, must needs send him a retainer. These Scots like money : what should she send him ? She sent him one thousand guineas. What did the Scotsman do ? Would he touch his hat and take it ? Not he. The professional retainer was five guineas ; so he promptly sent back to the duchess nine hundred and ninety-five guineas. Evidently no love was lost. She appeared at his rooms late : Murray was not there. " I could not make out, sir, who she was," said his clerk to him next morning, " for she would not tell me her name ; but she swore so dreadfully that she must be a lady of quality." In justice to Lord Campbell, he gives this story, but he underlines the latter words so as to be sure that you should not pass the joke by !

The age of Murray's manhood was, both in law and in public life, an age of famous men. In both he ranked with the ablest and the best. His undoubted capacity, his unbounded industry, his skill both in advocacy and political debate ; Britain and the widen-

ing Empire took stock of him. Burke singles him out for eulogy: even Horace Walpole, with his cynical *flair* for touching off both weakness and strength, says: "Murray, who at the beginning of the session was awed by Pitt, finding himself supported by Fox, surmounted his fears and convinced the House, and Pitt too, of his superior abilities." Those three men alone would have made any Parliament famous. Walpole's sketch of them is dexterously drawn, and he says of Murray that he "was the brightest genius of the three."

The field of his energy was so wide that to write his part would be to give an account of one of the greatest periods of England's development. But even in an impressionist sketch, such as this, I must justify the label of enlightenment with which this great advocate and judge and parliamentarian adorned his homage to justice.

He was in 1754 at the height of his parliamentary fame, having reached the great twin distinction of being at once Attorney-General and leader of the House of Commons. Time and again high office passed him, or he passed high office; and then in 1756 he became Lord Chief Justice of England—the greatest, as I think, of a great succession of men. Even then, with his peerage of Lord Mansfield, he remained dedicated to political tasks: and he met his old foeman, now Chatham; and they fought with brilliance, not without bitterness: Pitt's gibes were barbed.

But it was in the Chair of the Lord Chief Justice that Mansfield's enlightenment shone. His light was not only an illuminating, but it was a consuming power. Old abuses were burnt out, old practices causing delays, heartburnings, failures—many of these withered away. Gradually the law as a polished weapon of justice became surer and swifter in ripping pretext from fraud, and in shearing asunder those technical entanglements which prevented men's reach towards good sense and fair dealing. So the law of England not only grew, but came into the open, not at least so forbidding as before—at last, indeed, an approachable figure. Public sale, Bills and Banking, Insurance, Shipping and Contract,—all that is but a pointing of the finger towards a few out of many of those topics which first jurymen, then the City of London, then this Island, and then the world at large, saw taking their place—their helpful and honest place—in the affairs of men. Mansfield, day by day, and stone by stone, was building up the noble fabric of the Common Law of England.

The dominions of England were extending—was the law of England to be the inheritance of all under the flag? Commerce was being regularized, categorized; the relations of men by land and sea were being made more secure. Above all, human freedom was assuming a new predominance in right and thought. Law was leading onward in all these things, and Mansfield was leading the law.

You must, of course, take enlightenment on balance. There are some things in Mansfield's doings, notably in the trial of Horne Tooke and in other of his quasi-political legal doings, of which you would not say that enlightenment was their quality. As for the law, it is said that out of thousands of his judgments, only two were reversed. As to his quality of enlightenment, one may surely say that he stands on the reckoning with a mighty balance to his credit.

Indeed it is to the name of the great Chief Justice that I affix the label enlightenment as denoting his outstanding quality. Here, by the way, is a notable first point. Mansfield loved letters, loved the law, and had a shrewd eye for men who loved either or both. He had come in contact with a truly great legal mind when he met Blackstone. He measured him in that sense and was determined that he should not be lost to the world. He pushed his candidature for the professorship of civil law at Oxford. The Duke of Newcastle found the young luminary unwilling to be a political tool: that was enough for the Duke—Blackstone was not appointed.

Mansfield was furious: learning had been snubbed; the law had been wronged. He moved instantly, recommending Blackstone to go down to the University and without a Chair to lecture upon law. The effect was magical: a genius had been found; Mr. Viner came along with an endowment for a Chair of the Common Law, and Blackstone's were the first Vinerian Lectures, and Blackstone's *Commentaries* saw the light.

Their effect spread far and wide. I give you, my readers, a conundrum. How and in what manner did this piece of enlightened business on the part of Mansfield profoundly affect the history of the United States? You cannot answer? Well, I would tell you: it is curious and it is deeply interesting. But it is another story.

The field, the spread—so to speak—of this enlightenment in the service of justice was so great that, even a sketch such as this, must be picked out in single points. I started with one of a personal cast. On public issues take but one or two, and then see how Mansfield bore himself.

The mark of a great constitutional lawyer is that he pays

homage to the spirit of the Habeas Corpus Act, and the mark of a poor constitutional lawyer is that he thinks himself superior to that muniment of the liberties of England. How did Mansfield bear himself here ?

Let two instances suffice.

We had wrung Minorca from Spain by the Treaty of Utrecht, and our Governor of the island, unjustly and without process of law, cast a native into prison. The native bided his time and, on the Governor returning to England, summoned him for false imprisonment. Every conceivable prejudice existed, every conceivable point of law was stated, but Mansfield was firm as a rock. "A subject born in Minorca," said he, "has as good a right to appeal to the King's Courts of Justice at Westminster as one who was born within the sound of Bow Bell." And as to the argument that tyranny and its methods were excused by a Governor's great office, he made short work of that.

"The monstrous proposition," he declared, "that a Governor acting by virtue of letters patent under the Great Seal is accountable only to God and his own conscience, that he is absolutely despotic and can despoil those under his rule both of their liberty and property with impunity, is abhorrent to the principles of natural justice and is contrary to the law of England, which says to all the King's subjects, 'whensoever and wheresoever you are wronged, you shall have a remedy.'"

Take another instance—also on an Imperial scale, but with world-wide reverberations and striking a note which American—thoughtful over the things which have influenced their history—remember with gratitude. It is the well-known case of the negro James Somersett, taken from Africa as a slave, sold and bought in Jamaica as a slave and kept and used as a slave according to Jamaican law. So he might have lived and died unknown. But his master brought him over to England in his service and kept him on board ship in the Thames, and proposed to take him back to the colony. Into whose head the bright idea entered is not known, but ere the vessel left the Thames—she and all aboard being under the jurisdiction of English law—the famous negro claimed that law's protection, actually claimed his liberty, and there was issued on his behalf a writ of Habeas Corpus.

Millions more than his master watched the great cause whose issues were as wide as civilization itself. No doubt slave-owners all the world over thought that things in England had come to a pretty pass. So they had. The case was tried before Mansfield.

It must not be thought that he invented the law. Not quite; but looking back on it, he got little precedent to help him in his enlightened interpretation, writing fearlessly into the letter the spirit of the law of England. Lord Chief Justice Holt had given glimpses of the principle in a London case in which a defendant was sued for the price of a slave bought by him in Virginia according to its law, but the price unpaid. And in a valuable judicial aside Lord Chief Justice Holt had said, "As soon as a negro comes into England he is free," adding, however, "one may be a villein in England but not a slave. The action would have been maintainable if the sale had been alleged to be in Virginia, and that, by the law of the country slaves are saleable there." Holt's language became a little clearer in later proceedings though he still harped on villeinage. But somehow human freedom did not make much headway under the like of that. And there were other cases of an opposite trend.

Enlightenment, and an advancing age, were put to the proof. The question of slavery under the law of England was in issue directly and in all its breadth. Note how Mansfield dealt with it:

I am quite clear that the act of detaining a man as a slave can only be justified by the law of the country where the act is done. . . . Then what ground is there for saying that the status of slavery is now recognized by the law of England . . . I care not for the supposed dicta of judges, however eminent, if they be contrary to all principle. . . . Villeinage has ceased in England, and it cannot be revived. The Air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin . . . let the negro be discharged.

Said the slave to Mansfield:

I am a human being. I am detained as a chattel here in England by a fellow man. This is not, cannot be, according to law.

Said Mansfield in reply:

In all points you are right. Go free.

The label of enlightenment is justified for Mansfield in the sphere of liberty. It is so also in other spheres, notably that of equality before the law. But the greatness of the uplift of his doctrines may be measured by the enmities of vested interests and of social and religious prejudice which they aroused. Take this latter and hear the great Chief Justice, in a language on the subject

of religious liberty which seemed to place in the very seat of justice the principles for which the Pilgrim Fathers crossed the sea. Locke was the Prophet of Toleration ; Mansfield was its High Priest.

Nothing shabbier could be conceived than the double device adopted by the City of London against dissenters. It first passed a by-law inflicting a heavy fine upon any elected freeman who would not serve as sheriff. Then, knowing that a dissenting freeman could not, according to his principles, take the sacrament according to the rites of the Established Church, it elected a dissenter to be sheriff and then fined him because he would not serve, violating his conscience. This trick outrage was upheld by the lower Court.

But Mansfield led the House of Lords, and once more under him the cause of Enlightenment triumphed :

> There is no usage or custom independent of positive law [said he] which makes Nonconformity a crime. . . . Persecution for a sincere, though erroneous, conscience is not to be deduced from reason or the fitness of things. Conscience is not controllable by human laws, nor amenable to human tribunals. Persecution, or attempt to force conscience will never produce conviction and are only calculated to make hypocrites or martyrs. . . . All positive laws inflicting any pains or penalties for nonconformity to the established rites and modes are repealed by the Act of Toleration, and Dissenters are thereby exempted from all ecclesiastical censures. What bloodshed and confusion have been occasioned from the reign of Henry IV, when the first penal Statutes were enacted, down to the revolution in this Kingdom, by laws made to force conscience ! There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic than persecution. It is against natural religion, revealed religion, and sound policy.

People read in our time, with astonishment, the massive strength of such declarations. Is not our wonder at the passion of them but a measure of the progress of toleration since that day ? I think I can read in them also a kind of determined majesty, not unaware of hostilities and detraction. In this manner, best of all, Mansfield answered the snarling and carping of that social, political and religious prejudice, which was working in many vulgar minds, and now and then was aimed like a poisoned arrow with consummate cleverness by Junius.

Mansfield's determination in the region of the equality in legal status of all citizens as such led him to great lengths in the admission of even a Popish priest to the law's protection against the code and

fashion of the hour. The enlightened jurist was denounced as an infidel after his fairness to Nonconformists—as a Papist after the priest's trial. Campbell makes quite a fuss over the attacks of Junius and, bovine as usual, he tries to impale Junius with about as much success as an ox in a field would try to gore a terrier.

There came a day (1780) when the turbulent thousands, shouting "No Popery," marched down under the lead of Lord George Gordon to intimidate Parliament from passing the Catholic Relief Bill, and this by storming Westminster. Mansfield, then in the House of Lords, was endeavouring to restore order. Peer after peer, sorely rumpled, bedraggled, and dishevelled by the tender mercies of the mob, entered the House; confusion prevailed; no business was done; their Lordships disappeared, all but one, namely Mansfield, then in his seventy-sixth year, whose efforts to restore order and decorum had met with this sorry result!

His home was in Bloomsbury Square, whither he retired. The revolt continued for days, and was spreading; and the mob were manifestly to hound themselves or to be hounded on to Mansfield. He quitted his dwelling just in time. The crowd, which had broken open Newgate itself, surged to the Square. It entered the great judge's dwelling, destroying furniture, that fine library of books, those priceless papers, and burned all up with fire, leaving only blackened walls.

Society itself was ashamed; the Government of the day affronted. Amends by way of compensation were proposed for the illustrious sufferer; but with courtesy and incomparable dignity he refused the offer. In the course of law Lord George Gordon was tried before him. Mansfield would not vary from scrupulous justice by the breadth of a hair. It was not a clear case as to Gordon's actual participation in lawless acts: Mansfield advised the jury, if in any doubt, to lean to mercy's side, and Gordon was acquitted.

Was I not right that Justice was very sacred to Mansfield? With great gifts and with constancy and fervour from young manhood to a great age, this lawyer served it, paying to it, throughout, the sincere and splendid homage of Enlightenment.

Editorial Note—About two years ago, in answer to our request, Lord Shaw of Dunfermline made to us a promise of a contribution to the Journal; and he accordingly wrote the above paper. Its issue was somewhat delayed owing to the absorption of the author in onerous judicial work.

THE LEGISLATION OF PALESTINE, 1918–1925.

[*Contributed by* NORMAN BENTWICH, ESQ., M.C., *Attorney-General.*]

IT is now some eight years since southern Palestine, and more than seven years since the whole of the country, came under British administration. That administration was subject to the limitations of a Military Occupant until July 1920; but on the appointment of Sir Herbert Samuel as High Commissioner for Palestine it assumed the full powers of a civil Government. Its constitutional position, indeed, was not fully legalized till September 1922 when the Palestine Order in Council was promulgated under the Foreign Jurisdiction Act and established a system of Government similar to that which exists in Crown Colonies; while its international status was only legalized a year later when the Mandate, which was accorded to England at the Conference of San Remo in 1920 but had reposed on the knees of the Council of the League of Nations, was at last brought into force. During this period of eight years articles have appeared from time to time in the *Journal* [1] recording the progress of legislation from year to year. Now, however, when an epoch of the Administration has been brought to a close by the end of the term of the first High Commissioner, it may be of interest to review the legislative process in the mandated territory.

Legislative Machinery.—A word should be said at the outset about the mechanism of legislation. During the Military Occupation the law was laid down by Proclamation or Ordinance either of the Commander-in-Chief of the Egyptian Expeditionary Force, or the Chief Administrator of the Occupied Territory. As soon as the Civil Government was established, and prior to the issue of any definite constitution, the High Commissioner formed an Advisory Council composed of ten official and ten non-official nominated members to which all legislative proposals were submitted. The Palestine Order in Council provided for the constitution of a legislative council to be composed of twelve

[1] See *Journal of Comparative Legislation*, part iii, for the years 1922–1925.

elected non-official members and ten official members under the Presidency of the High Commissioner. That body, however, did not come into existence because a large part of the Arabs refused to participate in the elections; and provision was therefore made in an amending Order in Council for legislation to be carried out as heretofore by the High Commissioner in consultation with an Advisory Council. It was contemplated that the new Advisory Council should be composed with a majority of non-official nominated members; but owing again to the non-co-operating policy of the Arabs it was finally found necessary to appoint a purely official body. All draft Ordinances are submitted to the Colonial Office before being placed before the Advisory Council, and they have to be published in the Official Gazette as Bills for at least one month before they are enacted, so that opportunity may be given for any criticism or proposals for amendment. Finally, there is a power of disallowance by His Majesty in case an Ordinance which has been enacted is found to be defective; and that power has been used on one occasion.

Need for New Laws.—In his report of the Administration of Palestine from 1920 to 1925, Sir Herbert Samuel, after touching upon the principal features of the development of the country with regard to public security, justice, finance, communications, public health, agriculture, commerce, and industry, makes the following observations with regard to legislation:

> All this new wine could not be contained in the old bottles. The laws of Turkey were not adequate for the needs of a progressive State. An active administration, a developing industry and commerce, could not dispense with the facilities and authority that a body of modern Statute Law alone could give. I have mentioned that it has been the policy of the Government not to change the laws which closely touched the lives of the people and to which they were accustomed, except in cases of clear necessity. But in many matters, especially on the economic side, the Turkish legislation was hopelessly inadequate. . . . Altogether no fewer than 130 Ordinances have been enacted during the five years. (The total by the end of 1925 reached 150.)

Treatment of Ottoman Codes.—The Ottoman Law, indeed, has remained the basis of the legal system of Palestine, forming, as it were, the Common Law of the land which is being modified by the Statute Law. In accordance with the established traditions of British Administration, the law and custom of the country have not been violently disturbed; and the Palestine

Order in Council which establishes the constitution of the country provides that the jurisdiction of the Civil Courts shall be exercised primarily in conformity with the Ottoman Law in force in Palestine on November 1, 1914, and such later Ottoman Laws as have been or may be declared to be in force. The Ottoman Law has to a certain extent the form of modern scientific legislation. Influenced by the codifying enthusiasm that seized upon the countries of Continental Europe in the nineteenth century, the Turkish Sultan Abdul Mejid in the middle of that century initiated a movement for the reform of the law of his empire. Codes of Criminal, Commercial and Maritime law, and of Civil and Criminal procedure were borrowed from France with uncritical admiration: and the Napoleonic system was rendered into the cumbersome Turkish language and given as a law to Ottomans, Arabs, Armenians and Kurds. In two principal branches, however, of the law the Ottoman Reformer did not discard the established rules and practices of his peoples, but simply restated them in a more orderly and scientific system. Those two branches deal with civil rights and with rights in land. The Ottoman Civil Code, or the Mejelle, which was compiled at the same time as the other codes, is, as the late Lord Curzon pointed out at the Conference of Lausanne, the product of theological jurists and based upon the Moslem religious law. It comprises a system of civil rights suitable for an agricultural and pastoral people, governing questions of contract and—though very inadequately—of tort, of moveable and immoveable property, of the duties of judges and of evidence. It does not, however, comprise any rules of personal and family law, because those matters were not to be dealt with by the Courts of the State but by the various religious Courts of the different communities, acting according to their peculiar religious books.

The law with regard to rights in land which was arranged in the form of a Code was also designed for an agricultural and pastoral people. It deals not with the whole of the land of the country, but with the greater part of it which is held of the State; and it regulates it according to principles which are derived from ancient principles of the Ottoman conquerors. It has, as its general purpose, to secure the cultivation of all agricultural land and to preserve the rights of the rulers of the country to resume possession of such land if the tenant of the State does not use it to advantage. Land, however, which is held in full ownership and has been dedicated for some charitable purpose (known as *wakf*), which is inalien-

able and imprescriptible and taken out of disposal, is subject not to this special land Code but to the rules of the Moslem Religious Law which are embodied partly in the Mejelle and partly in more ancient texts.

The British administration has not yet made any fundamental innovations with regard to the Civil Code or the Land Code. It has indeed replaced the rules of evidence contained in the former, which are curious and mediæval, by rules more in conformity with modern principles; and it has taken steps to render effective registration of title to land which in the Ottoman régime was nominally compulsory, but in practice was frequently evaded, and when not evaded was frequently falsified. It has also removed the restriction against juristic persons owning land, which in the Ottoman régime forced corporations to register the land through a nominee who was not under the control of any Court of Chancery.

Commercial Law.—The interference of the British Administration has been more remarkable, in respect of what has been called "the Gallic infusion" in the Ottoman system, that is, the Codes of Criminal and Commercial Law and of Procedure which followed, all too closely, the Napoleonic archetypes. The Commercial Law, in particular, has had to be greatly amplified because the Ottoman legislator had made little provision for development subsequent to the middle of the nineteenth century. Neither the Code nor the Imperial decrees contained adequate regulations for limited Companies or Co-operative Societies; and while laws were passed for the protection of industrial property, they were not in conformity with the later international conventions on these matters. Here the task of the legislator was simple. There was little to cut away, and little to adapt. The English Companies Acts, with some necessary simplifications and some provision for stricter Government control, have been embodied in a comprehensive Companies Ordinance. The principles of the English Law with regard to Trade Marks and Patents and Designs have been enacted, with some modification in the way of simplicity: while an Ordinance based on Indian Legislation provides for the establishment, privileges and control of co-operative societies. The Law of Copyright has been more directly brought into conformity with the law of the British Empire, because the Imperial Copyright Act itself has been applied in Palestine by Order in Council.

Criminal Law and Procedure.—It has not been so easy to

remedy deficiencies of the Ottoman Criminal Law. While it is recognized that a Code, based upon a model over a hundred years old and amended in a very haphazard and unscientific way, is not a fitting instrument, the proposals made to replace it by a more modern Code in the early stages of the Civil Administration met with opposition, and were for a time laid aside. That project is now receiving further consideration; but all that the legislator has hitherto been able to accomplish is to reform the law with regard to penalties, particularly so far as they affect young offenders, and to deal with a number of offences which had escaped the attention of the Ottoman Government.

The Civil Procedure, like the Civil Code, has been amended only in minor details; but the criminal procedure has been fundamentally changed. The French system adopted in the Ottoman Code is complicated and elaborate, and unsuited to the conditions of an Oriental country. Gradually British principles of the investigation and prosecution of crime as they have been worked out in our Eastern Empire have been introduced; and by the Trial Upon Information Ordinance the English procedure is followed with regard to the preliminary inquiry into offences, committal for trial and the trial itself. Other Ordinances based upon English law have prescribed rules of arrest and domiciliary search, introduced the English practice with regard to Contempt of Court, and replaced the principles of evidence in criminal as well as in civil cases. The Palestine legislator has been assisted in this reform of procedure by the example of Cyprus where, as in Palestine, a British Administration has supervened upon an Ottoman régime.

Organization of Courts.—The system of the Courts themselves has been radically changed, principally in the way of simplification. The Turks, usually parsimonious in administration, were extravagant in the number of judges; and within Palestine there were no less than thirteen Courts of First Instance, each with three members, three Courts of Appeal each with five members, and a number of Magistrates sitting alone in addition, while in nearly every case, civil and criminal, there was a right of recourse to the Court of Cassation at Constantinople. The British Administration, following again the example of Cyprus, has maintained the principle of Courts of three for the trial of more serious cases, but has reduced the number of those Courts to four; has abolished the recourse to Cassation, and made

the Supreme Court the final authority, subject to a right of appeal in civil cases of a certain value to the Privy Council in England. But perhaps the most striking change in the judicial arrangements, apart from the change of personnel, is that the Supreme Court has been vested with the power to check abuse of authority by the Executive through the introduction of remedies that correspond with the English writs of Habeas Corpus and Mandamus. Nothing could mark more emphatically the break from Ottoman tradition.

At the same time, while English ideas of procedure, evidence and the rule of law have been introduced into the country, the legislator has had to take note of the primitive conditions which exist in certain parts of the population. It was found necessary to arm the Executive with certain preventive powers against lawless and dangerous characters; and Prevention of Crime Ordinances, based upon Indian models, have been enacted to enable such persons to be bound over or to be placed under police supervision where there is evidence that they are threatening a breach of the peace although they have not committed any specific offence. Legal effect, too, has been given to the principle of collective responsibility which is recognized amongst the Arab tribes and Fellaheen, and the application of tribal law by the tribal headmen has been legalized by the establishment of Sheikhs' Courts. For these provisions the Palestine legislator has found his model in the law of certain of the West African Colonies.

Administrative Law.—Turning now to the sphere of Administrative Law, it has been necessary for the Government to make fresh provision for nearly every department of the Administration. Apart from the different standards of British and Ottoman government in this respect, there has been a dominant need of readapting the system of a province of the Empire to that of an independent and separate country. Thus laws had to be enacted for the organization and regulation of the Police and Gendarmerie Forces, the functions and powers of the Public Health Department, the administration of Customs, Prisons, Railways and Ports, the conservation of antiquities, and so forth. Models for these requirements were not wanting in the legislation of our far-flung Empire, that model being favoured which was known to the head of the department concerned. In one case, indeed, the Palestine Ordinance is more original, that dealing with antiquities. Certain novel principles on this head

were laid down in the abortive treaty of Sèvres, and later reproduced in the Treaty of Lausanne with Turkey; and effect has been given to them in the Palestine legislation which has been described in an article in this *Journal*.[1]

It has been necessary also to lay down the conditions of admission to, and to provide for the regulation of, different professions, *e.g.* advocates, surveyors, doctors, and veterinary surgeons. Such Ottoman laws as existed in these matters were inadequate, and have been replaced by enactments upon English lines. Experience, too, has proved the necessity of replacing the Ottoman Law in numerous branches of modern Governmental activity, such as public sanitation and quarantine, the import and export of animals, the protection of plants, the preservation of game, the protection of forests, mining and quarrying. On most of these subjects the Ottoman legislator had issued a law, usually looking for inspiration to some Gallic authority, but not only were the laws of the Empire no longer suitable for the conditions of a little country, but also there was frequent lack of exact prescription. Defects which did not trouble the Turkish Governor or the Turkish Court, caused difficulties when matters came before a Court applying stricter English canons of interpretation. It has been found desirable, therefore, to replace the Ottoman Law by a measure combining what was useful in it with more recent and exact prescriptions taken from English and Colonial models, instead of tinkering with the old law by an amending Ordinance. In two developments of Government control the Palestine Administration has been original, and may perhaps be an example for other legislatures. The one is the regulation of advertisements, which was actually the first matter on which the Civil Government issued an Ordinance. Palestine was happily free at the time from the disfigurement of the remorseless advertiser, and it was possible, without affecting private interests, to issue a sweeping measure declaring that no advertisement should be exhibited on any hoarding or wall, or anywhere in the country save on boards in specified places prescribed by local authority, or on business premises, subject again to the control of the local authority. The other original departure concerns Town Planning. On this head, while deriving its law from the legislation of England and India, the Government has taken fuller powers of dealing with private property for the purpose of Town Planning Schemes than are authorized elsewhere.

[1] See *Journal of Comparative Legislation*, Third Series, vol. vi, pt. iv, p. 251;

Reform of Taxation.—The Government of Palestine has not yet carried out any large reform of direct taxation, but has maintained the principal Ottoman impositions of the House and Land Tax and the tithe, and introduced only minor modifications in their collection. On the other hand it has completely revised the customs tariff, has abolished the State monopoly of tobacco cultivation and in its place introduced a system of taxation and of regulation of tobacco which is designed to encourage the home-grown product, has revised the control of the salt monopoly, and has greatly simplified municipal taxation by the abolition of the local octroi which was burdensome and non-productive and several small municipal taxes and their replacement by a grant from State revenues. In these matters as also in devising the control of scientific inventions for which the Ottoman Law-book had not yet made provision—mechanical transport, the supply of electricity, wireless telegraphy, etc.—the legislator has had simply to adapt recent English or Colonial legislation.

Implementing the Mandate. — Another direction of legislative activity has been induced by the provisions of the Mandate. That governing instrument imposes certain obligations upon the Administration which required to be implemented by legislation. In order to give effect to the policy of favouring the establishment in Palestine of a national home for the Jewish people, the Administration was directed to facilitate Jewish immigration under suitable conditions and to enact a nationality law framed so as to facilitate the acquisition of citizenship by persons taking up their permanent residence in the country. An Immigration Ordinance was issued in the early days of the Civil Administration based primarily on the English Aliens Act of 1905 ; it has been replaced by a more complete measure issued in 1925 to which is attached a system of exact regulation to give effect to the principle that immigration should be defined from time to time according to the economic capacity of the country to absorb newcomers. The Law of Nationality, which has been laid down not by Ordinance of the Government of Palestine but by an Order in Council, in the part dealing with the immediate acquisition of Palestine Citizenship follows necessarily the provisions of the Treaty of Lausanne, while in the part dealing with acquisition of nationality by birth or naturalization it follows in principle and detail the latest English Nationality Statute, limiting, how-

ever, the power of obtaining Palestine citizenship by descent in accordance with the English law of 1914.

Another provision in the mandate prescribed the application to Palestine of the Extradition Treaties in force between the Mandatory and other foreign Powers; and to give legal effect to this clause, the Government of Palestine had to pass an Ordinance defining the procedure of extradition, which, owing to the capitulatory régime, was not in the Ottoman Empire a function of the State. The Extradition Act of 1870 was naturally taken as a model, but articles were inserted in the enactment to validate special agreements made with the neighbouring countries of Syria and Egypt which authorize the surrender of criminals with less formality than is prescribed in the English Statute.

Other articles of the Mandate require the Mandatory to adhere on behalf of Palestine to general International Conventions respecting traffic in arms and dangerous drugs, freedom of transit and navigation, etc., and to co-operate in the execution of any common policy by the League of Nations in preventing and combating diseases. Legislation has been passed in order to enable Palestine to carry out its obligations in these matters. Its source has been found in English Statutes such as the Dangerous Drugs Act, or in the International Conventions themselves.

Local Government.—The Mandate requires the Mandatory to encourage local autonomy; and in compliance with this prescription the Government has introduced several legislative measures which develop the Ottoman local institutions. It has provided for the establishment of local councils in the larger villages and in quarters of municipal areas which desire a more progressive local administration than the rest of the area. These councils have considerable power of taxation, and in fact approximate closely to the character of municipalities. Another enactment provides for the extension of the power of the local authority to raise loans, which was very imperfectly ordered in the Ottoman administrative law. A third measure provides for the establishment of Municipal Courts of honorary Magistrates who deal with minor offences committed within the municipal area. The Ottoman system gave the Municipal Council itself judicial functions in connexion with the contravention of Municipal Regulations. That confusion of powers was objectionable; and in place of it the Palestine Ordinance empowers the creation of a Court which is similar to the institution of Petty

Sessions in England, save that it deals only with the trial of minor offences and not with committal for trial of more serious offences.

Personal Status.—It has been mentioned earlier that the Ottoman Civil Code does not deal with questions of family law or personal status. These matters have been regulated for generations by the religious law of the different communities. The general principle of religious jurisdiction has not been disturbed by the Mandatory Government; but it was necessary to remove certain anomalies in the Turkish system by which the Moslem Religious Courts exercised an overriding jurisdiction over the members of the other communities with regard to intestate succession, guardianship, and the control of charitable endowments. In place of this privileged position of one religious jurisdiction, the Government has established a concurrent jurisdiction of the Civil with the Religious Courts of the non-Moslem Communities in all those matters in which those Religious Tribunals had not under the former system exclusive authority. Consequently the Civil Courts had to be given a law of succession to apply in cases where the parties concerned did not submit to the religious jurisdiction, and a law for the regulation of charitable trusts where the parties did not desire to constitute an endowment according to the religious law. An Ordinance concerning guardianship is under consideration. The law about succession adapts with regard to the form of wills the main features of the English law, and with regard to inheritance on intestacy the Ottoman Law of Succession to immoveable property held of the State, which law, from the point of view of liberality, compares favourably with the English Statute of Distribution. One novel provision in the law authorizes the Religious Court to apply the civil law of succession if it thinks fit, the object of this faculty being that the Religious Tribunals may retain the jurisdiction where the parties desire the application of the civil law but the distribution of the estate by a religious authority.

The law with regard to Charitable Trusts is modelled closely on a portion of the Ceylon Law concerning trusts. It was not considered desirable at this stage to introduce into Palestine the system of private trusts; but the Ordinance does apply to charitable endowments a number of the provisions of English equity and allows the incorporation of trustees of any charitable trust. As an appendage to this enactment, another measure has been passed,

which is based upon colonial legislation, for the purpose of constituting the office of Public Trustee of Charities.

Organization of Religious Communities. — The Government of Palestine has maintained in principle autonomy for the religious communities in their internal affairs. But it has been called upon to define by legislation the organization of two of the principal communities; and, further, it contemplates the issue of a general Ordinance allowing it to issue regulations for the government of any community, which will be substituted for the Ottoman Statutes that are no longer altogether appropriate. The two cases in which action has already been required concern the Moslem and the Orthodox Christian communities. For the control of Moslem religious affairs there has been constituted, by a system of primary and secondary election, a Supreme Moslem Council which supervises the administration of the Sharia Courts and of Moslem charitable endowments (Awkaf). This newly created body takes over the functions in Palestine which, under the old Ottoman régime, were exercised by the Sheikh ul Islam at Constantinople over the religious courts and religious affairs of the whole Empire, and which have now been abolished in the secularized Ottoman Republic.

With regard to the Orthodox Christian community, the Government found it necessary to come to the aid of its existing organization because on the one hand its Synod was not functioning owing to internal dissension, and on the other hand, its financial affairs were in a very parlous state owing to the accumulation of a vast debt during the war and the cutting off of pilgrimages from Eastern Europe which had previously furnished its principal revenue. Accordingly, an Ordinance was passed for the reconstruction of the Holy Synod and for the establishment of a Commission on the finances of the Patriarchate which is to supervise the administration of its revenues until the debt has been extinguished. The legislation on these communal matters had necessarily to be original as the circumstances which induced it were original.

Vista of Legislation.—There has been in Palestine during the last five years, and there will be for a long period, an unending vista of legislation. If much has been done to bring the Statute Law of the country into conformity with modern conditions, more remains to be done. The law-maker has continually to choose which field of activity should be the next to be regulated. To-day he may be looking to the field of labour, and con-

sidering how far English Statutes with regard to control of factories, workmen's compensation and such matters can be adapted, to-morrow he may choose to reform the Civil Procedure or to work upon the replacement of the remnants of the Ottoman Commercial Code dealing with the law concerning Bills and Bankruptcy which are recognized to be defective; while the municipal organization and the simplification of the land law will soon have to engage the reforming ardour.

Lastly, in the near future, the task of consolidation of the work done must be undertaken. When the Corpus Juris of Palestine comes then to be compiled, it will form a collection befitting the most historical of countries and illustrating the whole development of law from tribal custom, through religious codes, to modern scientific statements of the law, and international conventions for the regulation by uniform legislation of the interests of the whole body of civilized states.

THE DOMINIONS AND TREATIES.

(*Contributed by* Sir William Harrison Moore, K.B.E., C.M.G., LL.D.)

The articles in this *Journal* by Professor Berriedale Keith [1] and in the *British Year-Book of International Law* by Mr. Malcolm Lewis [2] and Mr. Norman MacKenzie,[3] may be taken as some indication that the serious call of Professor Gilbert Murray to lawyers has not fallen on deaf ears. It is clear that legal thought and legal method have to be applied to ascertain the significance of the political facts of the last six years, and that it is not enough to rest upon the distinction between legal rule and constitutional practice, if voluntary co-operation is to work smoothly. The question "What is the British Commonwealth?" is one which can only be answered by the combination of what Marshall C.J. called the "lawyer's rigour and the statesman's breadth of view," together it may be added with a careful examination of the several forms of political union, and of those "anomalous conditions" which have notable existence in every age from the Holy Roman Empire onwards. At the present time it is incumbent on us to examine incidents as they arise and consider the significance of what is done and what is contended. Here there is at any rate one element of continuity in our constitutional history. Now as ever the contest takes place over forms, and because it does so, it necessarily excites some impatience and repulsion amongst those who have not realized that traditionally we conduct our constitutional discussions rather over the concrete case than on abstract theories explicitly stated.

The Halibut Treaty.—The Halibut Treaty has been frequently and fully discussed; but one or two aspects of it may be mentioned, particularly in view of later developments. The contest over the description in the title of the contracting parties—Canada,

[1] *See Journal of Comparative Legislation*, Third Series, vol. v, p. 161; vol. vi, p. 135, 193; vol. vii, p. 106.

[2] 1922–3, p. 21; 1925, p. 31.

[3] 1925, p. 191.

United States or Great Britain, United States—involved of course the claim by Canada of her competence internationally to sustain obligations towards other States to which she alone—to the exclusion of the rest of the Empire—was a party. The British contention was in substance that the Treaty was entered into by His Majesty in an undivided capacity, so that in relation to the United States there was no distinction of capacities. On this point the result was indeterminate. As however the title describing the national parties was for the time being abandoned, and His Majesty the King agreed without limitation or qualification of capacity, the advantage lay with the British Government.

To the contest whether the British Ambassador should join with the Canadian Minister in the signature, I should perhaps attach more importance than does Professor Keith, and while agreeing with those who think that the daughter States have something to learn in manners, I should not agree that the Canadian insistence was merely a "meaningless and ill-timed gesture." It was, I take it, the assertion that as the Treaty was one between Canada and the United States, it was for the Canadian Government alone to decide for itself the terms to be proposed to or accepted from the United States. Any British interests concerned were those of a third party, proper to be considered by the Canadian Government on representation by the British Government to it, but not necessarily accepted by Canada as modifying the agreement she might make with the United States. On this point again, the case is indeterminate. The British Ambassador does not sign; the signature is that of Mr. Lapointe, the Canadian Minister, alone. But the "Full Power" under which he signs is the ordinary unqualified power, containing no mark of any limitation of Mr. Lapointe's representative character, or indication that he signed in any other capacity than would have been filled if the British Ambassador had signed with him, or alone.

British Government's Part in Ratification.—The different views that are held as to the part played by the British Government in the ratification of such a treaty are exhibited in the passages set out from the Canadian Parliamentary debates in Mr. Malcolm Lewis's article.[1] Does the Secretary of State, in receiving such a treaty and laying it before His Majesty, act merely as a private secretary to the King, or does he act as a constitutional Minister tendering advice to the King, for which he and the whole British

[1] *Year-Book of International Law*, 1925, p. 235.

Ministry are responsible to the British Parliament? Mr. Mackenzie King quotes Sir Cecil Hurst's question as an expression of the Foreign Office view in favour of the "private secretary" theory, but it may be doubted whether Sir Cecil Hurst's question necessarily implies the view which Mr. Mackenzie King attributes to the Foreign Office. Professor Berriedale Keith[1] considers that the present practice as to signature and ratification means "the negation of the right of exercising the treaty power to any Dominion," and it may be questioned whether the British Constitution, which did not readily accept a King's private secretary,[2] will easily assimilate an in-and-out rôle for a Minister of State, and a sphere of ministerial irresponsibility in respect of the use of the Great Seal and of the countersignature to the Sign-manual Warrant authorizing that use. (Note that by the Act of Union with Scotland, 6 Anne, C.11, Art. 24, the Great Seal of the United Kingdom is to be used for sealing all treaties.) On the other hand there is the analogy of the position of British Ministers in the case of Dominion legislation. In the case of Dominion Acts, the Secretary of State has to advise the Crown on the exercise of the power of disallowance, and in the case of Bills reserved, on the withholding of the Royal Assent. The grounds on which those powers may properly be exercised have been continuously narrowing, as the sphere of Dominion self-government has expanded from internal concerns to matters which the Dominion considers to belong to its control over its political, social or economic life, though they may detrimentally affect external interests, whether of other parts of the Empire or of other countries. In such a case the Secretary of State recognizes that part of his constitutional duty as a Minister of the Crown may be exercised to control Dominion action. If the measure is one which falls within the accepted sphere of self-government his constitutional responsibility does not extend to the policy which the measure embodies. In other words, practice does already recognize cases in which the Minister who is the instrument of the King's action is not responsible for the wisdom or justice or expediency of that action, though in such cases he does advise and co-operate as a constitutional Minister of the Crown. Of course, if every Treaty is made by the King without distinction of the identity of the party bound, no British Ministry could disinterest itself to this extent in any treaty, for the assumption of obligations to foreign Powers in this way could

[1] *Journal of Comparative Legislation*, Third Series, vol. vi, p. 155.
[2] Cf. *Todd's Parliamentary Government*, vol. i, p. 191, *seq.*

not by any stretch of constitutional analogy be made to concern the Dominion alone. But it is precisely this which is the centre of the matter. Canada is contesting the sole and undivided action of the Crown ; and if it be admitted that the King can undertake obligations towards foreign Powers separately for the several parts of the British Commonwealth, the function of the British Secretary of State in advising the Crown as to ratification may become no more than to satisfy himself that the Treaty imposes no obligation upon any other part of the British Commonwealth than that which has presented the Treaty for ratification, and having done so to advise that constitutional doctrine requires that the necessary steps should be taken to give the Treaty its due legal form. Whether a system of separate obligation of the kind contemplated can be worked out consistently with any legal unity of the British Commonwealth of Nations in international relations, whether from a system in which the British Empire was a single entity in international relations but for most practical purposes a number of separate entities in constitutional relations, we are not proceeding to one in which such unity as remains is to be found in the constitutional sphere while international relations are given over to severalness ; whether the system would not be just that system of multiple Kingship which was thought to be negatived when the Irish Free State was formed within the British Commonwealth of Nations instead of on the basis of dual-kingdoms ; and whether Great Britain could accept a position in which British Ministers might be even the formal instruments for the making of treaties adverse to British interests or to the interests of other parts of the British Commonwealth—these are problems which would have to be explored by any conference of experts such as the late British Ministry proposed.

Canadian View.—The Canadian view that, as the Dominion sustains the obligations of the Treaty by itself alone, not seeking to impose them on the rest of the Empire, it has the sole determination of the extent to which it will modify its proposals for a Treaty out of consideration for the interests of other parts of the Empire, has as corollary the equal right of a Government representing those other parts of the Empire in foreign relations to decline to accept such determination as final and to make its own representations and offer its own inducements to the foreign Power to prevent it from entering into the proposed Treaty with the Dominion. Therefore if the British Government acts merely *pro forma* as the instrument by which the King's Full Power issues to a Canadian

plenipotentiary to sign the Treaty, it must be conceded the right to make representations to the United States in the interest of (say) Great Britain or Newfoundland, and to use diplomatic pressure to prevent the conclusion of a Treaty which the King has given authority to make. Such discordance of diplomacy would put altogether too great a strain upon the understanding of foreign Powers. One of two courses alone seems possible. Either the diverging interests must be reconciled in conference with the acceptance of some mode of final determination there, or the forms for concluding treaties must be revised so as to enable the Dominion to conclude such treaties without invoking even the formal concurrence of the British Government.

Before leaving the Halibut Treaty, two things further may be noticed. The Treaty was not actually ratified until October 1924. When it was laid before Parliament in Great Britain in 1925,[1] it bore the title "Treaty between Canada and the United States of America." The British Government therefore must be taken ultimately to have acceded to the Canadian view as to parties, and the change is doubtless to be referred to the resolutions of the Imperial Conference 1923. On the other hand, in the United States Treaty Series, the document is apparently headed "Convention between the United States and Great Britain for the preservation of the Halibut Fishery of the Northern Pacific Ocean, including Behring Sea."[2] I believe that the heading is no more a part of a treaty than was the title a part of our older Acts of Parliament; but a divergence of the headings adopted by the several parties is significant of an imperfect accord as to parties bound, which may yet breed trouble.

Scope of the Treaty.—The other matter is the scope of the Treaty. Passing by the questions raised by the "understanding" as to persons affected which was annexed by the United States Senate to its ratification of the Treaty in the first instance and subsequently abandoned, the subject of the Treaty is fisheries on the high seas beyond territorial waters, a matter far removed from reciprocal internal arrangements, and itself involving a plunge into one of the most delicate international questions. These fisheries, so far as halibut is concerned, are forbidden to the vessels and nationals or inhabitants of the United States and of Canada, and the two countries are to co-operate in making these prohibitions effective, each having

[1] Cd. 2377.

[2] Cf. *American Journal International Law*, 1925, "Official Documents," p. 156.

a police power over the vessels, etc., of the other, and each undertaking to pass the necessary legislation to make the Treaty effective. The Canadian legislation, in the case of Canadian vessels, nationals and inhabitants not merely punishes acts done outside territorial waters, contrary to the orthodox constitutional rule of *Att.-Gen. for N.S.W.* v. *McLeod*,[1] but sets up a number of offences constituted of making use of or entry into Canadian ports with a prohibited intent or having fished or being about to fish in the prohibited area, or of having in possession in Canada any halibut caught in the close season: these are offences by whomsoever committed, irrespective of nationality. The admitted design of this scheme of legislation passed by Canada and the United States is to make it impossible for the vessels or nationals of other countries to engage in the fishery of these waters of the Pacific except upon a compliance with the conditions agreed upon by Canada and the United States. By this means Canada accomplishes all and more than all that was in the view of the United States Senate when it expressed the understanding that the Treaty extended to all "the nationals and inhabitants and vessels and boats of any other part of Great Britain." Clearly in all this there is international matter in abundance, both in treating mere presence as a ground of jurisdiction for extra-territorial acts of "foreigners," whether persons or vessels,[2] and in using local jurisdiction as a means of controlling the fisheries on the high seas by the agreement of two States alone instead of by a general international convention. As to the constitutional validity of such legislation by a Dominion, Canada has the advantage of Section 132 of the British North America Act, 1867, whereby—

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries.

The section of course raises difficulties. If, as was the case in 1867, the position still is that all obligations undertaken towards foreign Powers are undertaken by the King in an undivided capacity —the view apparently expressed in the form of the Halibut Treaty —the legislation falls more obviously within the powers of s. 132 than under the Canadian view that the treaty is one between, not the Empire, but Canada alone, and the United States. Whether

[1] [1891] A.C. 455.

[2] On which Mr. Beckett's article in the *British Year-Book of International Law*, 1925, may be usefully referred to.

in any case the section extends to authorize the exercise of power by Canada beyond her territory or to make acts done beyond such territory offences, *quære*; but I should hesitate to say that the section would not have been a sufficient authority to Canada to set up a government in territory received by her under such mandates as were issued under the Peace of Versailles to Australia, New Zealand and South Africa. Canada, however, moved by the doubts attending the Halibut legislation, as well as some other matters, has forced the constitutional aspect of extra-territorial legislation in a more general way, and in June 1924 the Government submitted to the Dominion Parliament a motion for an address to the Crown asking that the British North America Act 1867 should be amended so that—

> Any enactment of the Parliament of Canada, if expressed to operate extra-territorially, shall have and is deemed to have had that operation if and so far as it is a law for or ancillary to the peace, order and good government of Canada.

Quære, whether an Act for the regulation of fisheries on "the high seas extending westerly from the limit of the territorial waters of Canada" would be within this provision. No action appears to have been taken in the British Parliament on the subject during the session of 1925, and obviously the subject is one for consideration not with a single Dominion, but with all the Dominions. Meantime, if Canada alone is the contracting party with the United States, she may have undertaken more than according to the current doctrine of constitutional law she is competent to perform, while Great Britain, which could supply the defect of constitutional power, is not *ex hypothesi* bound by the Treaty or concerned with its performance. The United States has experiences of her own which may induce her to take an indulgent view of the divorce between international responsibilities and constitutional power in a complex system of government; but, as already observed, it is not clear that she regards Canada and not Great Britain as the party bound to her. Moreover, in the end, no constitutional difficulties can be allowed to stand in the way of the fulfilment of international obligations. If the unique nature of the British Commonwealth of Nations permits one part of the Commonwealth to assume separate obligations towards foreign States, its constitution must be adapted to permit their fulfilment.[1] Whether the conferring and acceptance of international obligations in itself

[1] *Cf.* Fiore, cited Dickenson, *Equality in International Law*, p. 224.

works a change of constitutional power so as to render unnecessary recourse to the constituent authority (*i.e.* the Imperial Parliament) as seems to be assumed in South Africa by the manner in which the Government of the Union has entered upon and exercised its mandate,[1] is a question which opens up a new phase of matter of State in English law, and will involve amongst other things a new exploration of the relation of international and municipal law in our system.

Treaties may impose Obligations on one part of the Empire only.—The importance of the Resolutions of the Imperial Conference 1923 appears to lie in the explicit recognition that treaties made by the Crown may impose obligations on one part of the Empire only, and that this is intended not merely in the constitutional sense in which Mr. Mackenzie King contended that Canada stood outside the Treaty of Lausanne;[2] but in an international sense, defining and limiting the party bound to the foreign Power. For not merely is the Full Power to "indicate that part of the Empire in respect of which the obligations are to be undertaken," but "the preamble and text of the treaty" are to be "so worded as to make its scope clear." Effect to this is given in the form of the Treaty signed at Washington on June 6, 1924, "for the suppression of the smuggling operations along the international boundary between the Dominion of Canada and the United States, and assisting in the arrest and prosecution of persons violating the narcotic laws of either Government, and for kindred purposes."[3] The sole plenipotentiary of the King is appointed by him "in respect of the Dominion of Canada." More significant still is the incorporation of the same terms in the recital of parties—"His Majesty the King, etc. (full titles) in respect of the Dominion of Canada and the United States of America, being desirous of suppressing smuggling, etc., have agreed to conclude a convention, etc."

The formula "in respect of" the several Dominions has become familiar by its use in the Full Powers issued for the purposes of the Treaties of Peace and the Treaty of Washington to the plenipotentiaries appointed by the King on the nomination of the several Dominion Governments. But in these cases the Full Power thus

[1] *Cf.* Keith, *Constitution, etc., of the Empire* (1924), p. 298; *History of Peace Conference*, vol. vi, p. 365. Probably the same view underlies the judgment of the Supreme Court of South Africa in *Rex.* v. *Jacobus Christian*, *Journal of Comparative Legislation*, Third Series, vol. vi, p. 245.

[2] *Year-Book, International Law*, 1925, p. 40.

[3] Canada Sessional Papers, 1924, No. 351.

qualified was one of a set, of which some (*i.e.* those issued without the nomination of a Dominion Government) were unqualified by any limiting words. The formula was in fact employed as a means of associating the whole Empire in the negotiation and signature of a Treaty, to which the British Empire was a single party, completing its execution of the Treaty by a single Act of ratification. Even so employed, its significance has been the subject of great difference of opinion.[1] Where a single Full Power was issued, it was in the usual general form unqualified by any limiting words (as in the case of the Full Power issued to Mr. Lapointe for the Halibut Treaty).

In the Treaties themselves, the designation of the King as a contracting party has been without any distinction or limitation to suggest that he contracted as for some part only of his dominions, or in any limited character, though where a set of Full Powers was issued, those plenipotentiaries who had received a Full Power " in respect of " a Dominion merely, are described as representing the King " for " that Dominion, and this has sometimes involved the repetition of a signature in the Treaty, as when at Washington Mr. A. J. Balfour held a general Full Power, and also a Full Power in respect of the Union of South Africa. The ratification in all cases may be taken to have been a single general act.

In the Smuggling Treaty of 1924 the formula " in respect of " is introduced into the Treaty itself and the limiting or qualifying terms extend to the whole scope of the Treaty. The King, in respect of Canada, agrees with the United States, and he makes no other agreement ; he is represented solely in respect of Canada by his plenipotentiary, who must be taken to sign in that single character. The form of ratification must, it would seem, follow the Treaty, and therefore it must be taken that the ratification has been solely in respect of Canada.

Personality of Autonomous Communities.—The choice of apt words for adapting the unity of the Crown to the existence of distinct autonomous communities of which the King is the constitutional head and bears the juristic *persona*, is a difficulty which belongs to our undetermined attitude as to the personality of these communities. In constitutional law, our lawyers seem uncertain whether they should speak of the Crown representing the community, or of the

[1] *Cf.* The reports on the Washington Conference by Sir Robert Borden to the Canadian Government ; and by the late Sir John Salmond to the New Zealand Government, and the views of General Smuts as reported in *Journal of the Parliaments of the Empire*, 1922, p. 907.

community representing the Crown (as where it is claimed that a State or the Commonwealth in a federal system is entitled to prerogatives of the Crown); whether there is one juristic personality or several, how far the Crown in one "right" can legally be separated from the Crown in another "right" either for purposes of jurisdiction or for purposes of substantive right: Australian and Canadian reports are full of instances. In international relations, the same difficulty appears and for the same reasons.[1] The words "in respect of" are more apt to describe a subject-matter of agreement (as where the "C" mandates are issued "in respect of" the territories designated) than to indicate the entity which is to enjoy the rights and owe the duties. And no doubt something of this is implied in the description: the subject-matter is one which belongs to the special interests of the Dominion, as relating to its territory, or to things to be done or not to be done there, and excluding therefore the territory of other parts of the Empire and things done or happening there; the obligation has in view a particular geographical area, co-extensive with or situated within the territorial limits of a Dominion. The special interests may indeed go further. The Dominion is a social community: a treaty "in respect of it" may concern solely the members of that community, whether as participating in the benefits it confers or as being subject to the restrictions which ensue from it. This of course involves some notion of distinct "nationals" within the Empire, a notion in fact forced upon us by the partial nature of Treaties of Commerce, and by the provisions of the Treaties of Peace,[2] and (as already seen) embodied in the legislation of Canada to give effect to the Halibut Treaty.

But it is clear that when the Smuggling Treaty is made in respect of Canada, something more is intended than the identification of the area of operation. Canada is conceived of as a political community with an organized government, and (in the light of the resolutions

[1] The terms of the "C" Mandates are in fact chaotic. First, the instrument recites that the mandate is conferred on His Britannic Majesty, to be exercised on his behalf by the Government of New Zealand in the case of Samoa; then, in the next paragraph, it is declared that His Britannic Majesty *for and on behalf of the Government of New Zealand*, has agreed to accept the mandate; so that each of the parties designated is in relation to the other principal and agent. The article defining the territory speaks of the mandate as being conferred upon His Britannic Majesty for and on behalf of the Government of New Zealand, and it is that Government which is called the Mandatory. (*History of the Peace Conference*, vol. vi, p. 639.)

[2] Cf. *History of Peace Conference*, vol. vi, p. 364, and the Canadian Nationals Definition Act, 1921.

of the Imperial Conference of 1923) there is the implication that that political community is an entity, a whole, capable of holding rights and owing duties towards a foreign Power. It seems clear also that we can no longer insist upon the unity in the Kingship or the singleness of the act of ratification, as making the act of the Crown affect equally and without discrimination the whole of the Dominions of the Crown in their relation to the foreign Power concerned.

Respective Relations of a Dominion and the British Empire to a Foreign Power.—There remains the question—what is meant by a treaty "imposing obligations on one part of the Empire only," and in a concrete case, what is the relation of Canada and the British Empire respectively to the United States under a treaty such as the Smuggling Treaty, 1924?

In the first place, as between the several parts of the Empire, Canada has alone the rights and obligations of the Treaty. No claim for performance of the Treaty can be made except with the assent of the Canadian Government: no person and no Government within the Empire could advance the claims made by the State Governments of Australia in 1907,[1] that every British subject considering himself wronged by a foreign Power must enjoy the right of appeal to the Imperial Government for his redress, whether or not he had the support of the Government of a colony or Dominion of which he was a citizen. And the question whether the occasion has arisen for presenting a claim to the foreign Power for performance of the Treaty appears to be primarily a question for the decision of the Dominion rather than the British Government: the latter can hardly make the absolute claim it made in 1894 in the *Costa Rica Packet Case* in response to the representations of the Government of New South Wales.[2] Again, there could be no question that any liabilities arising out of the Treaty must be borne by the Dominion and not by the British revenues, thus avoiding the class of question which arose in *The Creole* (Forsyth's *Cases and Opinions*, pp. 406–7), *The Florence* (1882), (Parliamentary Papers, Cd. 3453); the *Fortune's Bay Incident* (1878), (Parliamentary Papers, Cd. 3762). But these matters, important constitutionally, do not involve the international relation.

When a treaty is so far in respect of a Dominion that a per-

[1] See Keith, *Responsible Government*, vol. ii, p. 804, and Victorian Parliamentary Papers 1907, No. 23.

[2] The correspondence is published in N.S.W. Parliamentary Papers, 1894–5, Part 3.

formance may have to be made there, the political and constitutional relation has long been notorious enough to bring the Dominion Government formally to the notice of the foreign Power. As long ago as 1888 the Fisheries Treaty with the United States was expressly made dependent on the assent of the Parliaments of Canada and Newfoundland ; the General Arbitration Treaties of 1908 and 1911 were subject to the condition that the British Government, in any question affecting a Dominion, reserved the right to obtain the concurrence of that Dominion to the special agreement for arbitration [1] ; while in the Boundary Waters Treaty 1907, the co-operation of Canada was made an integral part of the Treaty, since the three members of the Joint Commission to be appointed by the King were to be appointed on the recommendation of the Governor-General of Canada in Council. There is, of course, no notion of separate obligation here. But, though the King is contracting, not merely is the subject-matter Canadian, but the concurrence or co-operation of the Dominion Government in one form or the other is made a part of the compact with the Foreign Power. In fact, the constitutional and political situation has been notorious enough to call for the association of the Dominion Government with the terms of the Treaty in case where performance had to be made in its territory or where the Treaty specially concerned the interests of that community.

Association of a Dominion Government with a Treaty.—It was a natural advance to associate the Dominion Government with the making of the Treaty itself, as a means of assuring to the foreign Power the specific performance of the agreement, instead of making the obligation conditional upon the assent of that Government, or making performance precarious as depending on the willingness to co-operate of a Government which had not assented. In the conditions of to-day, one could hardly expect a foreign Power to agree to a Treaty the fulfilment of which depended on the active co-operation of a Dominion unless it was satisfied in advance that the Government of the Dominion assented to the assumption of the obligation. In this sense the participation of a Dominion Government in the treaty-making acts has a very real meaning and value in the international relation. Such association requires that the foreign Power should have official cognizance of the Dominion Government and also of someone properly invested with the character of representing that Government in the tran-

[1] Keith, *Responsible Government*, vol. iii, pp. 1106–7.

saction. Any such recognition of the Dominion Government in the transaction may have this international significance also. There have been occasions in which a foreign Power (the United States in 1886 and France in 1892) has taken exception to a Dominion Government as the instrument of performing His Majesty's obligations under a Treaty.[1] In the theory of the unity of the British Dominions in foreign relations, and the right of the King to perform his Treaty obligations by such instruments as he pleased or the law allowed, the objection was untenable. But if the Treaty itself named the Dominion Government as the instrument of performance, the rôle of the Dominion Government being a part of the treaty obligation, would be plainly unchallengeable. In that case, however, other questions might arise—whether acts done by the King otherwise than through the Government of Canada could be relied on as acts of performance, and whether, in case of non-performance by the Government of Canada, performance could be claimed of His Majesty the King.

Dissociation of the British Empire from Obligation.—The association of the Dominion Government with the Treaty when it is to be active in performance is one thing; the dissociation of the British Empire from the obligation, save that part of the Empire "in respect of" which the Treaty is made, is another. Is this dissociation completely effected in the case in question?

While the King agrees in respect of Canada, is represented by his plenipotentiary in respect of Canada, and (it may be presumed) ratifies in respect of Canada, he appears to act not in any limited capacity as King of Canada, or as the constitutional head of the Government of Canada, but in a capacity according with his title, which is set out not merely for the identification of a person but as signifying that Canada, though having rights and duties of her own, holds these within the wider political community, *i.e.* the British Empire, to which she belongs; and therefore holds them separately only so far as is consistent with membership of that State. That does not mean, it is suggested, that the nature and extent of the obligations of the Treaty are to be measured and limited by the powers which the constitutional law of the Empire confers upon the Government (including the Legislature) of Canada. It is rather that the King in his fullest capacity (*i.e.* the British Empire) is bound to the complete fulfilment of the Treaty, irrespective of any constitutional limitations on Canada, just as he would be bound inter-

[1] Keith, *Responsible Government*, p. 1113.

nationally by any Treaty which as a matter of constitutional law required some alteration of the law in order that its terms should be carried out. In this sense every Treaty appears to do something more than impose obligations upon one part of the Empire alone. It must be admitted that it is not easy to remain satisfied with anything so vague as consistency with inclusion in the British Empire as the measure of Canada's right and obligation, since the inquiry involves ultimately a consideration of the nature of the British Empire itself. But at least it may be assumed that the British Empire is for purposes of peace and war a single State and not a confederacy or alliance whose members are bound by agreement to come to each other's assistance. In the case of the British Empire, there is no such reciprocal obligation of assistance; but peace or war involves the whole in that condition, both in international and constitutional law. Some light may perhaps be obtained from a comparison of the pre-war position of the colonies and Dominions with that of the Dominions to-day. In the writer's opinion, the general disposition to deny international personality to the British colonies and Dominions was not unconnected with the very common tendency of publicists and jurists to concentrate attention on States as "Powers," and to neglect the co-operative relations of political communities, and the extensive organization of the society of nations for co-operative purposes. It appears hard to deny the personality of colonies or Dominions when His Majesty acceded to or denounced on their behalf conventions with foreign Governments and when Australia or Canada became actual members of international organizations, acting separately from the British Government, undertaking obligations and incurring liabilities.

In this connexion, the observations of Rehm [1] in distinguishing between the "confederation" and the international administrative unions, are suggestive—we use the term "confederation" only when a State is affected by the federal relationship in its entire personality, in its whole existence; and this is the case when the confederation relates to the so-called political aims of the State in the strict sense, to the question of state existence, of the preservation of the State, or, as treaties read, to the integrity and inviolability of the State: in other words, when it affects the most important aims of the State as a Power, national policy, policy in the strict sense. We may say that recognition of the Dominions in foreign

[1] Quoted in the *International Union of The Hague Conferences*, by Walter Schücking, pp. 21–22.

relations was for particular purposes and interests, and was not a general and unqualified recognition for all purposes of state life; that these particular purposes and interests were economic and social rather than political, that they belonged to the amenities rather than to the fundamental relations of international society; that in the main they were of the class of matters commonly recognized as within the internal and domestic jurisdiction of the State except so far as agreement brought them within the range of international law. In particular, they did not embrace matters which involved the whole political existence of the community in its relation to other communities. The Dominions were international persons in that they were entities in relation with other States, and were so recognized both by Great Britain and foreign States. They were abnormal persons in that the range of their relations with other States was particular and restricted, and not general and unlimited. If any matter arising out of these particular relations became one of contest or dispute with a foreign State, it passed into the sphere of high politics and became one between the foreign Government and the British Government, in a real and not merely a formal sense; the limits of the particular personality of the Dominion were passed, and it merged in the undivided unity of the British States.

Something like this appears to be the position in the case of treaties imposing obligations upon one part of the Empire only. If the Dominion is in diplomatic relations with the foreign Power (as the Irish Free State or Canada at Washington), claims and complaints based on the treaty may be exchanged between them. But if no settlement is arrived at, there may come the stage of demand, when the matter must pass into the hands of a Government charged with the general relations of the Dominion with foreign States and representing it in peace and war. In other words, it passes into the hands of the Government which has the control of the foreign relations of the whole, *i.e.* the British Empire or British Commonwealth of Nations. At this stage, this Government must accept the obligation or liability, whatever it is found to be, as its own.

Membership of the League of Nations.—If the Treaty be between a Dominion and a foreign Power which is a member of the League of Nations, there are some other factors to be taken into account. The Dominions have been admitted formally as members of an organized society of States which aims at including all States

accepting its objects and obligations, the scope of the League of Nations extends to every possible subject of international relation or dispute, so that it is concerned with the first and last things of state life. Members of a society which deals with the issues of peace and war, the Dominions have entered upon relations which differ not merely in degree but in kind from those which arise from the membership of international administrative unions. Moreover, the several Dominions are in direct relation with the Secretariat of the League. At the same time the status of the Dominions in the League is that of nations within the British Empire: it is in this character and not otherwise that they have been recognized and admitted. There are many difficulties to be overcome in reconciling the character and obligations imputed to members of the League individually with the fundamentals of the character in which these particular members are admitted, *e.g.* how far disputes between different parts of the British Empire are cognizable by the League.

But nothing in the membership of the League appears to destroy the unity of the British Empire in the matter of peace and war, or the implications thereof. As Art. XII, setting up the obligation to submit to arbitration or judicial settlement or inquiry by the Council, and Art. XV, imposing the obligation to submit to inquiry by the Council in default of submission to arbitration or judicial settlement, depend upon the existence of a dispute likely to lead to a rupture, the party in such a case would appear to be not the separate Dominion, but the whole British Empire as being involved in the imminent rupture. The dispute would be one between His Majesty the King in his full capacity and the foreign Power regarding a treaty made by His Majesty in respect of Canada, or whatever the Dominion may be. Art. XIII, dealing specifically with arbitration and judicial settlement, is not conditional upon the dispute being one likely to lead to a rupture, and it is in fact a mere record of opinion imposing no obligation. Canada is a member of the League and an adherent to the Court, and is apparently therefore a competent party before the Court. On the other hand, if the view suggested here is correct, the British Empire is an interested party. Either the British Empire or Canada might be a party litigant, and on the record as such; whichever of them was not thus a party, might be a third party under Arts. LXII or LXIII of the Statute of the Court. In the absence of adherence to the compulsory clauses of the Statute, parties depend primarily upon the agreement for

submission. An agreement between His Majesty the King, etc., in respect of Canada, and the United States for the submission of a dispute between Canada and the United States, would it is conceived be effective to make Canada a party on the record. But as the agreement for submission under the Statute of the Court probably need not be itself a treaty, and as competence belongs to Canada as a member of the League and adherent of the Court, probably a valid agreement for submission might be made between Canada and any foreign State member of the League and adherent of the Court, without the intervention of the British Government.

Some difficult questions will arise as to the operation of Art. XXXI regarding the nationality of judges of the contesting parties, where one of the parties is a member of the British Empire.

THE LEAGUE OF NATIONS AND MOSUL.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Treaty of Lausanne.—The case of Mosul forms an admirable illustration of the difficulties created by the acceptance of imperfect solutions of vital issues. The difficult conditions for negotiation which hampered British action at Lausanne resulted in complete failure to settle definitely the future frontier of Iraq. The Turkish delegation to the conference at Lausanne persisted [1] in the claim that on ethnographic, economic, historic and strategic grounds, the Mosul Vilayet ought to be left to Turkey, and Lord Curzon contested each point of his position. Ismet Pasha insisted that Turkey would never accept arbitration regarding the disposal of any portion of Turkish territory and proposed a plebiscite to settle the future of Mosul; Lord Curzon argued that, despite the holding of a plebiscite in Upper Silesia, the question had to be dealt with by the Council of the League of Nations and contended that reference to the League Council was by far the wiser course, and he declared that in case of necessity the United Kingdom would exercise the right to bring the matter before the League under Article 11 of the Covenant of the League of Nations. The final result was a compromise; Article 3 of the Treaty of Lausanne provides:

> The frontier between Turkey and Iraq shall be laid down in a friendly arrangement to be concluded between Turkey and Great Britain within nine months. In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations. The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories, of which the final fate will depend on that decision.

It will be seen at once that the terms of the article were unfortunately, though deliberately, vague; it was the earnest hope of the British Government that the issue might be settled by direct

[1] Parl. Paper Cmd. 1814 and 1929.

arrangement with Turkey, and that in the last resort reference to the League would be unnecessary. Nothing, therefore, was specified as to the nature of the action to be taken by the Council or the mode in which its opinion should be arrived at; it was open to argue that the League was not given any power of deciding the issue but could only make a recommendation. What was important, however, was that in the course of the discussion, doubtless with a view to secure Turkish acceptance of the proposed reference, Lord Curzon expressed the opinion that, if the matter came before the Council of the League, the Turkish Government would be invited to take part in the deliberations of the Council and no decision by the Council could be reached without unanimity.

The Negotiations of 1924.—In accordance with the treaty a definite effort was made by the despatch of Sir Percy Cox to Constantinople to bring about an accord between the two parties as regards the boundary. The effort, however, proved almost immediately a failure, and the Turkish Government issued on June 8 a statement in which it was recorded that Fethi Bey presented a memorandum in which he claimed that the Mosul Vilayet, though under provisional British administration, constituted juridically a part of Turkey. He contended that the British delegation, in demanding the cession of new territory belonging to the Hekkari Vilayet, had raised a new question not thought of at Lausanne, and by doing so had departed from the real purpose of the conference in order to formulate new claims. The memorandum further recorded a protest to the effect that Britain would have no right to present to the League a fuller claim on behalf of Iraq, and added that Turkey's renunciation of her rights over Iraq could only be confirmed after the boundary between Turkey and Iraq had been defined. Sir Percy Cox's reply maintained that the British proposals were in strict accord with the terms of the Treaty of Lausanne, and he asked for their acceptance by the Turkish delegation under reserve of making counter-proposals in matters of detail. This was refused by Fethi Bey, who demurred to the matter going before the League on the ground that the essential matter at issue had not been discussed.

The Action of the League in 1924.—The hopeless divergence of view between the two Governments, neither being prepared to make any concession, rendered reference of the issue to the Council of the League inevitable, and in September that body had to deal with the boundary issue and the terms of the mandate for Iraq.

The question of the boundary had been made of special urgency by reason of difficulties between the Turks and the Assyrians in the vicinity of the boundary which had resulted in the employment of British aeroplane forces in order to preserve the integrity of the boundary line.[1] Turkey did not decline to discuss the matter, and distinct progress towards a settlement was made. Lord Parmoor, who represented the United Kingdom, contended against the Turkish claim that the Council could only decide whether the whole of the Mosul Vilayet should be awarded to Turkey or Iraq; he insisted that no such limitation was suggested in the treaty, which left the issue of the northern boundary of Iraq entirely in the hands of the Council. He recognized that the Council might disagree with the British views of the boundary, but declared that Great Britain was fully prepared to accept the result of the Council's investigation and to abide by the boundary prescribed; but she reserved the right to reconsider the position if the Turks were unwilling to accept the decision in advance. The Turkish contention at first was frankly to the effect that the views of the Council could not be regarded as binding, and doubtless for this reason. M. Branting, who was acting as rapporteur of the Committee to which the matter was referred, was specially anxious to secure agreement between the two parties. Eventually he reported on September 30 that the difficulty had been removed, and that the Turkish delegate had definitely accepted the British view, that the decision of the Council must be binding on the two parties to the dispute. The Council, however, felt that it could not itself decide the matter without full information, and it appointed a Commission to proceed to Iraq and to investigate the issue on the spot. The selection of the members of the Commission, as Lord Parmoor pointed out, was not made on any recommendation of his, but by the President of the Council in consultation with the rapporteur, and, when on October 29 the Council took the further step of laying down a provisional boundary—the Brussels line—to be observed pending its deliberations,[2] the boundary defined was by no means that desired by the British Government in the interests of Iraq.

The League and the Mandate.—At the same time the Council had to decide its attitude towards the British mandate. Originally discussed at length in 1920 and 1921, the whole situation was vitally altered by the election of a king by the people of Iraq, including the

[1] *Cf.* the Bagdad message of September 29, 1924 (*Morning Post*, September 30).
[2] Parl. Paper Cmd. 2333.

Mosul Vilayet, in 1921, and in October 1922 a treaty was agreed upon with the king contemplating an alliance for twenty years, during which the British Government would afford Iraq such advice and assistance as might be required without prejudice to her national sovereignty, the treaty to be subject to revision if desired during its currency and its termination at the close of twenty years to be subject to the concurrence of the League of Nations unless before that time Iraq was admitted a member of the League, in which case notice of termination would be given to the Council. The treaty was very far from welcome in Iraq, and on April 30, 1923, a protocol[1] was signed which laid it down that it was understood between the contracting parties that the treaty would terminate on Iraq being admitted a member of the League of Nations, and in any case not later than four years from the ratification of peace with Turkey. It was added: "Nothing in this protocol shall prevent a fresh agreement from being concluded with a view to regulate the subsequent relations between the High Contracting Parties; and negotiations for that object shall be entered into between them before the expiration of the above period." In informing the House of Commons of this decision on May 3, Mr. Baldwin added that it would be the duty of Britain to use her good offices to secure the inclusion of Iraq in the League of Nations, and the British Government would be able to proceed to this step as soon as two essential obligations were disposed of, the delimitation of the frontier and the establishment of a stable government under the organic law of Iraq, and he asserted that there was every reason to hope that both these conditions would be fulfilled at no distant date. The protocol was supplemented in March 1924 by detailed agreements on specific points, the whole covering arrangements as to military aid, the employment of British officials, judicial matters, and finance. The military agreement recorded the acceptance by both parties of the principle that at the earliest possible date, and in no case later than four years from the conclusion of the agreement, Iraq should accept full responsibility both for internal and external defence, the material support and assistance being rendered by the British Government to Iraq to be progressively decreased in order to give effect to this principle. It is clear that this congeries of documents was hardly in any sense an arrangement which could be described as a mandate, but the League of Nations on September 27 finally decided to approve the British proposals

[1] Parl. Paper Cmd. 2120.

for the application to Iraq of Article 22 of the League Covenant, as set out by Lord Parmoor on September 20.[1] The arrangement accepted was simple; during the currency of the treaty of alliance Britain was to guarantee to all members of the League, who accepted the provisions of the arrangement and the benefits of the treaty, responsibility for the fulfilment by Iraq of the provisions of the treaty; an annual report was to be presented regarding the carrying out of the provisions of the treaty; disputes as to the interpretation of the treaty were to be referred to the Permanent Court of International Justice; the treaty was not to be varied without the consent of the Council of the League, and was to terminate forthwith, as well as the obligations of the British Government towards the League, if Iraq were admitted to membership of the League. If, however, the treaty terminated by efflux of time before Iraq was admitted a member of the League, the Council was to be invited "to decide what further measures are required to give effect to Article 22 of the Covenant." The meaning of this provision has been disputed; but, though Mr. Amery[2] has contended that it left it in the power of the League to require Britain to continue to act as a mandatory in respect of Iraq until such time as the League admitted Iraq to membership, it is clear that this interpretation is invalid. As Lord Parmoor,[3] who was responsible for the final form of the arrangement with the League, has legitimately insisted, the arrangement of 1924 precluded the idea that the Council could insist against the wishes of the United Kingdom in requiring her to continue to hold a mandate beyond 1928 or lay down terms or a time limit for her retention of the mandate. In point of fact, it is clear both from Mr. Baldwin's declaration in 1923 and the views of the Labour Government in 1924, that it was firmly believed that before 1928 the admission of Iraq to the League would have automatically terminated all difficulties regarding the mandate.

The Report of the League Commission.—The Commissioners of the League, after prolonged investigations, reported to the Council in a manner somewhat unexpected by either party. The issue before the Council was merely the question of the boundary, but the Commission extended its purview to the wider aspect of the question. They opposed partition of the area in dispute; important

[1] Parl. Paper Cmd. 2317.
[2] House of Commons, December 21; *The Times*, December 24, 1925.
[3] *The Times*, December 23 and 29, 1925.

considerations of an historic, ethnographic, and economic character, together with the sentiments of the majority of the population of the territory taken as a whole, were held to operate in favour of the union with Iraq of the whole of the territory south of the boundary line provisionally laid down by the League in October 1924. But certain conditions were laid down ; in the first place, it was essential that the territory should remain under the effective mandate of the League of Nations for a period which might be put at twenty-five years ; secondly, due regard must be paid to the desire expressed by the Kurds that officials of the Kurdish race must be appointed for the administration of their country, the dispensation of justice, and teaching in the schools, and Kurdish should be the official language of all these services. In their opinion, if the League control were to expire on the termination of the existing treaty between Great Britain and Iraq, and if certain guarantees of good administration were not given to the Kurds, the majority of the people would have preferred Turkish to Arab sovereignty, and the Commissioners held that in such an event it would be desirable that the territory should be awarded to Turkey, though in any cases Diala must be allocated to Iraq since it was necessary for the solution of her irrigation problems. It was also held that the territory must be regarded as appertaining to Turkey until that Power renounced her rights, and that the claims of Iraq were only moral claims, not legal, which would require to be weighed by the Council of the League. If partition were decided on, the Commissioners held that the best line would be one following the Lesser Zab. Further, the Commissioners were of opinion that it would be advisable that the League should appoint a representative to reside in the country for some years, so as to allay the uneasiness of persons who might feel themselves specially compromised by efforts in favour of Turkey, and to supervise measures for the protection of minorities. They explained at length the grounds which had rendered it impossible to employ even partially the mode of plebiscite, to which they had apparently at one time been partial ; the practical difficulties were quite insuperable and the result of anything that could have been arranged would have been quite inconclusive in value.

The Reference to the Permanent Court.—The report of the Commission was obviously a somewhat embarrassing document. The task set by the treaty was to define a boundary, and the Council might reasonably have expected to be given a distinct lead on this topic, depending as it did on local investigation. In lieu the

Commission showed itself very largely concerned with insisting on the continuation of the League's control of Iraq, and made its recommendation on the boundary issue dependent on the decision adopted on that head. The question was referred to a Committee by the Council, which heard arguments on both sides, and on September 19 it was decided to refer two preliminary points for decision by the Permanent Court of International Justice. The British representative accepted reluctantly the decision, but Rushdi Bey, for Turkey, presented a strong case against the action taken. He insisted that Turkey had only consented to refer the matter to the Council on the strength of Lord Curzon's assurance that, if the matter came before the Council, the Turkish Government should not only have a seat on that body but a vote also, and the decision should fall to be taken by a unanimous vote. This had been understood by Turkey in the sense that reference to the Council meant mediation, and the consent given by Fethi Bey in September 1924 to the reference to the Council was based on this interpretation of Lord Curzon's undertaking ; moreover, the Turkish Constitution required ratification by the Grand National Assembly if any undertaking were to bind Turkey, and no such ratification had been accorded to the promise of September 1924. Turkey had never renounced sovereignty over Mosul, and would retain it until she relinquished it, nor would she recognize the Council in any other capacity than that of mediator.

The Decision of the Court.—The issues referred, despite the dissent of Turkey, to the Court were simple. It was asked to say (1) what was the character of the decision to be taken by the Council in virtue of Article 3 of the Treaty of Lausanne ; (2) whether the decision must be unanimous or might it be taken by a majority, and whether the representatives of the interested parties might take part in the vote. Unfortunately Turkey declined to be represented before the Court, which thus was in the difficult and unsatisfactory position of having to decide the issues presented without the advantage of hearing reasoned arguments by the representatives of one of the parties vitally affected. The British argument, as presented by Sir Douglas Hogg on October 26 and 27, was unquestionably strong. He contended that the only meaning reasonably to be placed on the Treaty of Lausanne was that the issue was to be referred to the Council in order that it might make an arbitral award, since, if mere mediation were proposed, the article would have been largely without value, it being obvious

that neither party was likely to accept a mediation unfavourable to its point of view. He contended that, if the Council were to act as an arbitral tribunal, it was *prima facie* the right of the tribunal to decide by a majority, as usual in international arbitrations. It remained, therefore, to see if anything in the Covenant of the League excluded this rule ; the Covenant by Article 5 adopted the principle of unanimity, but this applied only to matters in which it was acting in pursuance of duties imposed by the Covenant and had no regard to cases in which matters were referred to it apart from the Covenant. He admitted that in September 1924 the Turkish representative had at first insisted that in the view of Turkey the case fell under Article 15 of the Covenant, under which no obligation arose for the parties to accept even a unanimous view of the Council ; but precisely because of that reason M. Branting had taken special care to press for agreement between both parties to accept the decision of the Council as binding, and had finally succeeded in obtaining a definite agreement from the Turkish representative to accept the decision. If, however, it was admitted that it was a case of arbitration in which a majority decision was binding, it was clear that there could be no question of the interested parties voting, and thus making themselves judges in their own case. The Court accepted in substance one of the views presented by Britain. It held that the intention of the parties at Lausanne was to devise a definitive means of settling once and for all the boundary, that this view was in accord with the subsequent proceedings on both sides. Further, it ruled that the award was to be arbitral and of a nature quite distinct from any recommendation made by the Council under Article 15 of the Covenant, which had no binding force. There was, it ruled, nothing to prevent two parties to a dispute, as in the case of the Silesian boundary, agreeing to treat the recommendation of the Council as binding upon them and compulsorily settling the dispute. On the important question of the necessity of unanimity the Court rejected outright the British plea ; it held—as it could hardly fail to do, having regard to the whole tenor of the League Covenant—that a decision by the Council must conform to the principles laid down for its action, and therefore must be unanimous, subject, of course, to the principle equally laid down in the Covenant that, when disputes arise, the members concerned may take part in discussions, but their votes may not be counted in ascertaining unanimity. The Council, therefore, held that the decision to be taken by the Council of the League would

be binding on the parties and constitute a definitive settlement of the boundary between Turkey and Iraq, and that the decision must be unanimous in the sense that, while the representatives of the parties could take part in the voting, their votes would not count in ascertaining unanimity. It must be confessed that the judgment raises a serious difficulty. The British plea was logical in that it postulated that the parties to the treaty meant to provide a definite mode of settlement and invented the machinery for this end, namely, reference to a tribunal which would decide if need be by a majority. The Court agreed that the purpose of the treaty was to secure a definite result, but held that the tribunal selected was one which must be unanimous to render any decision, so that the purpose supposed to be aimed at was entrusted to a machinery which might very easily fail to act effectively. In the light of this decision—which as regards the necessity of unanimity was legally better motived than the British plea—it is easy to see that, had Turkey taken the prudent course of presenting her case by argument before the Court, she might have made out a strong plea for her view that the purpose of the treaty was to enable a settlement on other issues to be arrived at, leaving to mediation a problem which was at the moment insoluble. From Lord Curzon's declaration, which it is difficult to explain away without some sophistry, it may be conjectured that this was his point of view, and it is open to doubt whether this was not still the real meaning of the Turkish representative in September 1924, though it is possible that he unintentionally conceded more than he intended to admit. At any rate it is easier to understand and appreciate the indignation expressed in Turkey at the decision of the Court, and it is significant that Lord Parmoor has expressed recognition of the weight attaching to the argument that Fethi Bey, in September 1924, may not have had the right to pledge Turkey in view of the Constitution of that country, and has admitted the defective character of the terms of the Treaty of Lausanne.

The Application of the Judgment by the Council.—The unanimity demanded by the Court was, in point of fact, difficult to achieve, proving how difficult it will normally be to obtain a binding decision if unanimity is required. It is indeed more than doubtful whether the result would have been what was desired by the United Kingdom, if the League Council had not received a report of November 23 from General Laidoner, the Commissioner sent by it early in October to investigate alleged unsatisfactory incidents on the frontier between

Turkey and Iraq. The report showed that the fact that the frontier was in dispute led to unrest and minor incidents to which the Commissioner justly attached no serious importance, recognizing that defective maps helped to confuse the Turkish authorities; but he found evidence of deportations carried on by Turkish forces in the area between the Brussels line and that claimed by Great Britain, accompanied by cases of pillage, extortion and maltreatment and resulting in the influx of Christian refugees into Iraq. As Turkey took the obviously ill-advised course of refusing to permit investigation in the zone north of the Brussels line, further information regarding the deportations could not be ascertained, but the evidence adduced naturally and inevitably caused a strong feeling against extending Turkish authority south of the Brussels line. The necessary unanimity being thus achieved, the Council decided on December 16 that the frontier should be as laid down in the provisional decision of October 29, 1924, but this line was to become definitive only if within six months the British Government could submit to the Council a new treaty with Iraq ensuring the continuance for a period of twenty-five years of the mandatory regime defined by the treaty of alliance with Iraq and the British Government's undertaking approved by the Council on September 27, 1924. When this has been done the Council will give the directions necessary for the delimitation on the ground of the boundary. The British Government as mandatory is invited to lay before the Council the administrative measures which will be taken with a view of securing the guarantees for the Kurdish population recommended by the League Commission, and is also asked to act as far as possible in accordance with the other suggestions of the Commission as regards measures likely to ensure pacification and to afford equal protection for all members of the population and as regards commercial matters indicated in the Commission's recommendations. The Council's decision was at once accepted on behalf of the British Government, and its action was approved by the House of Commons on December 21 by 239 votes to 4, the Labour Opposition walking out of the House on the score that insufficient notice of the proposed approval had been given. The Turkish Government has abstained from any recognition of the Council's right to act after the determination of that body to obtain the opinion of the Permanent Court.[1]

The Prolongation of the Mandate.—The effect of the decision of

[1] *Cf.* Rushdi Bey's declaration, *The Times*, December 28, 1925.

the Council undoubtedly runs counter in some degree to the policy approved by that body in September 1924. The British policy as then announced was clearly directed towards the early termination of any British tutelage over Mosul in accordance both with the letter and the spirit of Article 22 of the Covenant which in such cases as that of Mosul merely contemplates the rendering of administrative advice and assistance until the territory can stand alone. Lord Parmoor stressed the fact that the term "mandate" was not held to be a suitable expression in the changed circumstances, and the Council accepted the British proposals. The new system involves an insistence on the system of mandate; a postponing of the probable time when the status will be ended by admission of Iraq to the League; and a further definition of the obligations of Britain as the mandatory power, by requiring that due measures shall be taken to secure the Kurds the special privileges which the League Commission recommended. There can be no doubt that Lord Parmoor is right in holding that these conditions could not have been imposed by the League under the terms of the Treaty of Lausanne, which merely assigns to it the function of determining the boundary, nor under its general powers. The acceptance of them by the British Government was, therefore, the assumption voluntarily of fresh obligations, to be justified on general grounds of policy, but not by any theory of obligation towards the League. Nor can it be denied that the effect of the prolongation of the mandate is inevitably to involve Britain more deeply in the affairs of Mosul and to render it rather more difficult to secure the capacity of the State to stand alone and to receive admission to the League. The example of Egypt shows clearly that it requires great self-restraint on the part of a protecting Power to work towards the end of training the State under its protection to stand by itself, and of enabling it to do without the advice and assistance which the protecting Power has rendered. Nor is it unnatural for a protected Power to come to rely on protection, especially if it is accompanied by lavish expenditure,[1] repayment of which is not required even in the future. On the other hand, it is clear that, strictly speaking, the obligation on Britain does not go beyond advice and assistance, that it does not compel the maintenance of forces in Iraq for pur-

[1] Apparently £175,000,000 to 1925; the current burden is over £4,000,000; the claim of Mr. Amery (House of Commons December 21, 1925) that nearly half of this would be spent on the air force ignores the extra expense of the location of the forces, while the use of Indian troops for purposes of no obvious concern to India is open to constitutional objections.

poses of internal order or external defence, nor exact large expenditure on defence and administration.[1] Moreover, the League clearly acquires a responsibility to secure the frontier which it has laid down, but it may be doubted whether in practice this would mean more than approval of Britain taking steps to repel any invasion of the territory awarded to Iraq. What, however, is certain is that the real prosperity of Iraq must depend on the restoration of cordial relations with Turkey, a fact to which recognition was accorded by Mr. Baldwin's overtures to the Turkish representative at the Court of St. James immediately after the decision to act on the pronouncement of the Council.

The Dominions and Iraq.—The necessity of seeking to achieve an accommodation with Turkey appears the more clearly when it is remembered that the British policy as regards Iraq is entirely the affair of the British Government and that the Dominions, which have no responsibility for it and whose governments and parliaments have not approved it, might find themselves involved in war in the event of it being impossible to secure the acquiescence of Turkey in the Council's decision. It is clear that Dominion opinion, which felt strong repugnance at the idea of war being renewed in 1922, would regard with grave distrust the renewal of hostilities over such a cause as Mosul. The argument of British undertakings towards the Arab people is not ignored, but it is remembered that the formal promises made by the Allies towards the Armenians have been dishonoured without serious qualms by Britain, and that British policy in Palestine has showed itself far from susceptible to Arab claims when they run counter to the policy of introducing Jewish settlers, while the protests of the United States have created the impression that British action as regards Mesopotamia has been unduly biased by regard to oil interests. An effective settlement on an amicable basis with Turkey would, accordingly, be welcomed in the Dominions as a sign of a prudent and farseeing foreign policy and as likely to counter too close relations between that country and Russia.

[1] The new treaty required by the Council between Great Britain and Iraq was approved by the Iraq House of Deputies on January 18, 1926. The haste shown is in striking contrast with the delay in 1924 in accepting the earlier treaty and the other agreements.

MARRIED WOMEN AND THEIR WORK.[1]

[*Contributed by* Miss M. Cecile Matheson.]

The Evolution of the Status of the Married Woman.—It seems a far cry from the days of *Wuthering Heights*, when a girl bride, trapped and married to a cripple, could discover to her consternation that everything she possessed was at the mercy and disposal of her husband. Step by step, since then, women have won a freedom that might well have seemed beyond the wildest dreams of hope half a century ago. Step by step she has emerged as a separate legal entity, but, even now, she suffers from the uncertainties associated with all piecemeal, or, shall we say, evolutionary legislation: "Is the old unity of the spouses partly or wholly done away with? How is this new creature to be classified? With infants? With insane persons?" Research shows, in fact, that it is not too safe to generalize upon her position. "There are apt to be curious blanks and anomalies in all piecemeal legislation, and, quite unexpectedly, we are apt to find that certain questions may well be answered differently depending upon how nearly the particular community feels that her status has approached that of the normal legal person."

Has a Married Woman the Right to her own Earnings?—One of these questions may be bluntly put: "Has a married woman the right to her own earnings?" The common person would suppose that the answer was in the affirmative, but the lawyers who drafted the Married Women's Property Acts belonged to and were dealing with a class of society where the subject did not arise, hence legislation that discriminated unfairly and probably quite inadvertently against the poor. The result is a great variety of answers, and the confusion is especially manifest in the United States, a land of pioneer social experiment, but with forty-eight different legislative authorities. Even emancipatory legislation often leaves loopholes for doubt, and there is a serious legal question as to whether a husband can give up to his wife this power over her own earnings. "While it is clear enough that a parent may make a gift or conveyance to his child" (including the right to

[1] "Husband's Right to Wife's Services." *Harvard Law Review*, February and March, 1925. Joseph Warren.

work for himself), " and to a certain extent contract with him, the same is by no means true under the married women's legislation."

For instance : " In Maine, from 1847 to 1857, the wife could become owner of real and personal property. The Act of 1847 did not mention earnings. The Court held that her husband was still entitled to her services." Similarly, in Texas, by the Act of 1848, " All property acquired by either husband or wife during the marriage, . . . shall be deemed the *common property* of the husband and wife, and *during the coverture may be disposed of by the husband only*."

Classification of the Questions Involved.—Roughly speaking, the questions on the subject fall under three heads :—

1. The value to the husband of the wife's services in the home ;

2. The value to the husband of the wife's work in his business, whether this be a joint effort or some special job ; and

3. The question of her work for a third party, whether this be carried on outside the home, inside the home, or in connexion with the service of boarders.

The Right to the Wife's Services in the Household.—" While it has been held (Michigan 1911) that a wife may recover for impairment of her capacity to earn outside her family, her husband . . . can sue her for the loss of services in the home." In Alabama " the earnings of the wife are her separate property, but she is not entitled to compensation for services rendered to or for her husband, or to or for the family " (1907).

Similarly, in various States, " the husband may recover for impairment of her ability to work for the family " or for the " impairment of her services in the home " ; these and similar decisions lead to the presumption that the husband, *qua* husband, has a right to his wife's domestic services ; though this may be coupled with rights on her side.

For example, in Rhode Island, " the obligation still remains on the husband to furnish his wife with support, including necessary medical attendance and care, and the husband is still entitled to receive the services of his wife performed in the care of his household."

Joint Business or Community Property.—The question of joint business or community property seems enveloped in less uncertainty. Judge Ballinger states the principle of the community system thus : " that whatever is acquired by the joint efforts of the husband and wife shall be their common property ; the theory of the law being that the marriage in respect to property acquired during its exist-

ence is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity." Yet it seems that the Courts, with their frequent tendency to deliberalize statutes to the detriment of the recently emancipated, have on occasion taken the view that a husband is entitled to his wife's labour in his business as well as in the home. The unequal right of disposal has been already mentioned, and this is found where the wife's right to her own property is most unequivocally stated. Thus it has been upheld that: "While the husband may . . . concede to the wife the wages of her labour, so that she may hold it even against his creditors, yet where the work and business are carried on by husband and wife in co-operation, the labour of the husband being united with that of the wife, the business and its proceeds will be regarded as belonging to the husband." The question turns very much on the acknowledgment of the right of the spouses to contract with each other.

Husband's Right of Relinquishment.—This right is allowed in certain States, expressed, for example, in West Virginia that, as the wife had "a capacity to receive a gift of her services from him, it may be suggested that, if he still possesses a right to her labour in the home or in his business, such right may be relinquished by him."

"To sum up; with respect to the husband's power to relinquish to the wife her right to her labour in his business, in those States where the spouses can contract with each other," and also in Iowa, "relinquishment is effective" (*e.g.* in eight States). . . . "With respect to relinquishment of services in the home, that principle is nowhere clearly recognized; and it is denied in Iowa, Kentucky and Utah."

Married Woman's Labour for Third Party.—The position is naturally both easier to define and more usually provided for in respect of a married woman's labour for a third party, although a woman's right to control her own earnings is in many cases of surprisingly recent date. Thus "in the district of Columbia, prior to 1896, the husband had full control of his wife's earnings and only in 1901 was 'the married woman secure in all property which she might acquire by her own skill, labour or personal exertions and given power to engage in any business.'" Michigan adopted the principle with great emphasis in 1911, and New York enacted in 1902 that the presumption of law should be that a married woman was alone entitled to her earnings "unless the contrary expressly appears." The problem was attacked much earlier in certain States, and consequently their legislation is to-day less thoroughgoing. Thus,

in Maryland, where a married woman was secured as early as 1842 the " fruits, increase and profits " of her skill, industry or personal labour, the Courts decided even in 1885 that " from their relation as husband and wife she is personally working for him and in his interest; though she has the privilege, if she wishes, to work for herself. *Circumstances should show that she has so elected.*"

Massachusetts works on statutes dating from 1855, and here it still holds that " a married woman engaging in business on her separate account shall obtain a certificate from a town clerk, and if she fail to do so, the business shall be liable to be attached as the property of her husband who shall also be liable on all contracts made in the business." One may imagine that in some cases the husband would be the one to see to it that the aforesaid registration was effectively made!

Work in the Service of Boarders.—Work in the service of boarders raises questions peculiar to itself and plunges us once more into the mist of uncertainties. Does work for a boarder rank " not upon her own separate account, but as part of her household work in the family of herself and her husband "? Sometimes the law says " yes," and the Courts say " no." The decisions appear, to say the least, contradictory. In Iowa " the majority of decisions which raise the question of the husband's relinquishing to the wife her right to her services are the cases where she has cooked and cared for boarders in the home. In the absence of special circumstances, the Iowa Court uniformly attributes the wife's services with regard to boarders to the husband and permits him to sue them and keep the proceeds of the suit. But if the husband consents to the wife's dealing with the boarder on her own account, the right to sue for compensation is hers." Here we have the touchstone that really tends to become the decisive factor in all these questions. Who has the right to compensation, the injured wife or the husband deprived of her services, present and potential? It is a nice question and one on which even the feminist may pause!

Right to Recover for Loss of Wife's Earning Capacity.—Indiana answers that " the husband alone recovers for impairment of her ability to perform the ordinary domestic work in the home and for loss of her society; the wife for diminution of her capacity to work for others," and Kansas adds, " even though at the time of the accident and before, her sole occupation were domestic." Other States take a similar view, and Massachusetts qualifies liberal professions with a lack of logic which " has, however, the practical

merit of preventing double recovery in suits for loss of her services."

In California, a different view seems inherent in the fact that "her husband may sue a third person who by his carelessness impairs her earning capacity," while the opposite extreme finds expression in the statutes of Utah which "expressly forbid any recovery by the husband on account of personal injury to the wife and vest such right of action fully in her."

Contracts actually between husband and wife are rarely allowed —"As she cannot contract with him she cannot become an 'employee' of his within the meaning of the Workmen's Compensation Act" (Mass. 1917, *cf.* Ill. 1869).

General Tendencies in the United States and Canada.—With all contradictions and qualifications, however, we can see that the tendency throughout the States is to secure "to the wife in very liberal fashion her services or earnings as if unmarried." Women wishing to know their precise rights must consult the law of the State in which they happen to reside, and they will probably be left wondering whether, if only Napoleon had reached the United States early in his career, he might not have found congenial codal employment for the rest of his natural life and been preserved from many less peaceable enterprises! Such a quest leads one to welcome the more a resolution taken by the International Council of Women during their recent Conference in Washington to the effect that every constituent National Council (and there are thirty-nine to-day and will be more to-morrow) shall prepare a summary of the law relating to women in its own country. Canada has anticipated and a comprehensive booklet on the *Legal Status of Women in Canada*[1] has been prepared by the Department of Labour. Here a short paragraph assures us that every woman has a sole right to her own earnings from independent work, though two States require a Declaration as to her independence of occupation. An invalid widower can claim compensation on the death of his wage-earning wife and apparently the orphaned children have the same rights whether the bread-winning parent is father or mother. The minute investigations which are the subject of the articles in the *Harvard Law Review* under consideration are not provided in this case, but the presumption is that the situation is rather less complicated than in the United States.

[1] *Legal Status of Women in Canada.* Published by the Department of Labour, Canada, at the request of the National Council of Women of Canada.

LABOUR LEGISLATION OF 1923.

LABOUR Legislation is rarely interesting to lawyers and jurists. It is too often concerned with the technical details of trades and occupations rather than with legal principles. It is apt to be administered by special machinery giving little scope for legal intervention. Much of it is, strictly speaking, public, not private, law, and has little or nothing to do with the mutual rights and duties of individuals. But if the model rules for promoting the welfare of employed persons contained in the Draft Conventions of the International Labour Organization are to develop into a new form of international law, not merely on paper but properly enforceable, it is essential that the labour laws of the various countries, purporting to conform to the international model, should be the subject of careful comparative study. They need to be scrutinized both as regards their technical details—a comparatively easy matter—and as regards the real legal meaning of the texts as interpreted and administered—an exceedingly difficult one. As far as actual texts are concerned, the International Labour Office gives some opportunity for comparative study in its annual volumes of labour laws, published since 1920 under the title "Legislative Series." The volume for 1923, which appeared in December 1925, is in bulk at least half as large again as the volume for the preceding year, showing that the post-war zeal in labour legislation had not abated. The more the volume is examined, the more impressive it appears. Indeed it is not till we consider the Indexes that we fully realize the immensity of the present world-wide legislative activity in the sphere of labour. The volume itself consists of about 1,500 pages, and nearly another hundred are devoted to a closely printed Chronological Index of all the labour legislation of 1923, direct or delegated, received by the International Labour Office. Only about a sixth of the laws and orders referred to in this Index are reproduced in the volume, which, however, itself contains over 250 measures translated or reproduced in full. The complete Chronological Index is a new and welcome feature not found in earlier volumes. It should prove of great value to persons who wish to study closely some branch of labour legislation or the laws of a particular country. Owing to the careful references to official sources, this Index would serve admirably as a basis for intensive research, and as the years go on the collected indexes will give a practically complete list of the labour laws and orders of the world, from which it will be possible to trace historical changes and developments. In fact it will be in subsequent years that

the true value of the Legislative Series to students and researchers will become increasingly apparent. Most of the other publications of the International Labour Office are of more or less ephemeral interest, prepared to meet the demands of the moment, and not intended as permanent works of reference. But a sound translation of some important Act will still be referred to for so long as any part of the law remains in operation, not only for purposes of study but for the practical purpose of ensuring the due observance of international labour conventions. For those who desire to have prompt information on new legislation in foreign countries, it must be confessed that the Series are of little use. It is surprising that the representative members on the Governing Body of the Organization, whether employers or workers, do not appear to want such information promptly, or are content to take it merely in the form of summaries (necessarily incomplete and only too liable to inaccuracy) appearing in other publications of the Office or in the press. Be that as it may, the volume of laws for 1923 did not appear until two years after the issue of the latest measure contained in it. It is true, the laws appear first individually in the form of occasional brochures, of which the volume is merely a collection. But at the beginning of the present year only about half a dozen of the labour laws of the year 1925 had appeared in English even in brochure form, so that the International Labour Office does not, in general, seem to provide translations of labour laws until nearly a year after their enactment. This unpunctuality is, however, the only obvious criticism to be made of the Legislative Series. The translations read well, and both translations and indexes are clearly the work of persons who know what they are about. After all, accuracy is the most important requirement, and a Legislative Series brought up to date at the cost of accuracy would be a poor substitute for the present excellent, if belated, volume. No doubt it is difficult to find fully qualified persons for work of this kind, requiring a wide knowledge of languages and, at the same time, familiarity with the technicalities of labour legislation. We are informed that only two English officials, out of the large staff at Geneva, are allocated to the task of editing, translating, proof-reading and indexing this immense volume. For so small a staff the achievement is a very remarkable one.

Scope of the Legislative Series.—The volume is not devoted quite exclusively to the legislation of a single year. A convenient plan adopted by the editors is to append to the texts of new legislation older laws on which the new depend, but which are not available in earlier volumes of the Series. Sometimes, again, sections of earlier legislation necessary to an understanding of a new provision are quoted in a footnote, or references are given to allied legislation, as for instance in the list of Labour Codes in other Mexican States, appended to the Code of Jalisco. Hardly any corner of the world is untouched. Laws and circulars on labour questions have been unearthed in China and inserted in the volume, which contains also the famous Persian decree issued, at the

direct instigation of the International Labour Office for the protection of workers (especially children) in the carpet factories of Kerman and Beluchistan. Japan and India, both active members of the Organization, are represented by important laws. There are ordinances regulating the work of natives in Mandated Territories and various colonies and protectorates. The British Overseas Dominions are well represented and the Irish Free State's adaptations of the Health and Unemployment Insurance Acts are given. But Canada's provincial laws (the main source of her labour legislation) are, with one exception, mentioned only in the Index, as are also the State laws of the United States. These omissions may be regrettable, but they are comprehensible in view of the great size of the volume without the laws in question, which are moreover easily available to English readers in other sources. No Acts appear from the Union of South Africa during the year, though the Index mentions a few not perhaps falling fully within the scope adopted for the Series.

Legislation of every European country of any industrial importance is included, with the exception of Jugo-Slavia whose new consolidated workers' protection and social insurance laws were completed in 1922 and accordingly included in the Series for that year. Russian laws are included and reveal, on the surface at any rate, no fundamental differences from the corresponding measures in operation in capitalist countries. One rather curious point stands out, however. In many countries there is a tendency to limit the number of young persons employed in proportion to adult workers, particularly for the purposes of apprenticeship and training. But in Russia we find orders prescribing the minimum percentage of young workers to be employed in various types of undertaking. There are some interesting laws of 1923 from South America, and the new Labour Code of Jalisco (Mexico) is given in full.

It seems to be the aim of the editors to include any measure which has legislative force provided it is otherwise of sufficient importance. The volume accordingly contains a great deal of delegated legislation as well as the direct Acts of Legislatures. In all countries legislative functions are very commonly delegated to Ministers, commissions, or officials in connexion with labour and industrial matters. Where elected Legislatures have little or no authority, it is indeed sometimes difficult to draw the line between direct and delegated legislation. For instance, should the Legislative Decrees of Italy be classed as Acts or Orders? These measures must in theory be submitted to Parliament for conversion into full-fledged Acts, but they go into operation without awaiting this process, and may remain for years of full legal effect while still technically only decrees. From the practical point of view in any particular country the distinction makes but little difference. But the question might well arise as to how far orders issued by delegated authority, and liable to be revised or revoked by such authority, could be accepted as rigid legislation purporting to put into operation the terms of a ratified Convention of the International Labour Conference. There is

great diversity in the practice of different countries in the use of delegated legislation. Some insert in Acts detailed provisions left by other countries to the discretion of administrative authorities. In some cases the orders deal only with administrative details, in others they form the most important part of the law (as, for instance, the orders under the French eight-hour day law). The Legislative Series seems to include, in theory, all orders of real importance and not dealing merely with details of administration. But practical considerations of space result sometimes in the inclusion of specimens only out of a series of similar orders. This is the method adopted in connexion with the provincial rules (containing, for instance, important provisions on accident prevention) issued in pursuance of the Indian Factories Act. The rules of Bengal alone appear in the present volume, though the Index refers to corresponding rules in several other provinces.

The field of legislation selected for inclusion in the Series is a wide one. It covers not only legislation for the protection of workers in its narrow sense (relating, for instance, to hygiene, safety, hours of work and minimum rates of wages), but also all measures regulating the relations between employer and employed and in some cases laws of special interest to wage-earners or potential wage-earners, whether or not other classes of the community are affected incidentally. Thus old age pensions laws giving pensions direct from public money to all citizens without adequate means are included, as well as social insurance laws based on the fact of employment by an employer. Laws imposing systems of compulsory labour service are also included in the Series, both where the intention is largely educational (as in Bulgaria), or where the purpose is the upkeep of roads or other public works (as in Peru, for all men residing in the country, or in Zanzibar for native labourers) ; and on the other hand, measures providing for the compulsory employment by employers of a certain percentage of partially disabled ex-service men. The rights of association and assembly, the handling of trade disputes, the conclusion and effect of collective agreements as well as the regulation of individual contracts of work or apprenticeship, all figure largely in the legislation of 1923. There are also a number of measures relating to unemployment, chiefly amendments of existing systems of insurance or regulating the organization of employment exchanges, and a few immigration laws in the volume.

International Agreements.—Immigrant workers are also affected by the international agreements affecting labour published at the beginning of the volume under the heading " International." These are chiefly bilateral agreements dealing expressly with labour and social questions and extracts from commercial and economic treaties touching such matters incidentally. A remarkable convention signed in 1923 by a group of Republics of Central America is also given. The bilateral agreements include the Franco-Polish convention of 1920, which was not ratified until 1923. This convention supplements and in some respects

expressly reaffirms the Convention of 1919 respecting the migration of workers from one country to the other. In practice, of course, the ostensibly mutual benefits are benefits promised to Polish workers in France, and the object of the Convention was no doubt to encourage Polish workers to give their services in France by promising them all, or nearly all, the privileges of French workers in the matter of social insurances, the acquisition of small holdings, participation in friendly societies and trade unions, and as regards public relief. Special provision for hospital treatment has even to be made, if necessary, in places in France where Polish workers congregate. There were Finnish-Swedish and Finnish-Danish agreements on workmen's accident compensation in 1923, and a Treaty respecting the economic and customs union between Esthonia and Latvia dealt also with this question incidentally. Most-favoured-nation treatment was mutually agreed to by Finland and Denmark as regards emigration and immigration rights, by an article in the Treaty of Commerce and Shipping, and the Treaty of Commerce of 1923 between Germany and Lithuania contains terms to facilitate the passage of foreign workers through their respective territories, granting to Lithuanian migratory agricultural labourers in Germany the same rights as those of German workers in respect of remuneration and conditions of employment, and regulating the recruiting of Lithuanians for such work. An article from the Treaty of Commerce and Navigation between Finland and Poland is also given, which places the nationals of either country working in the other on an equality with the nationals of the latter " in respect of the exercise of their trades and social insurance." The " Convention for the unification of protective labour laws for workmen and labourers," concluded by five Republics of Central America, is of an original type. It contains, in the first place, a series of prohibitions which are to come into operation within the territory of all the parties automatically and without the need of any special legislation. These include such matters as the prohibition of night work for women and young persons, and of Sunday work and trading, and the exclusion of children from employment. In the second place, the Convention contains a series of subjects on which the contracting Republics undertook to legislate within 18 months of the coming into force of the Convention. The legislation proposed would include social insurance laws, laws to regulate the work of women and young persons, laws to promote the creation of joint associations of employers and workers, the formation of co-operative societies and the construction of workers' dwellings, laws to establish official pawn-shops, and laws to encourage thrift and education and to prevent immorality. It is not stated whether this remarkable convention was ever ratified and brought into operation by all or any of the Republics. If it has been ratified we may expect later volumes of the Legislative Series to contain the resultant legislation of Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica.

Hours of Work.—It is impossible in a single article to give even an

approximately complete survey of the legislation contained in the volume. A few subjects of outstanding interest at the present time may, however, be briefly considered. One of these is the regulation of hours of work, a matter which suddenly became prominent as a subject for legislation after the war. Legislation of this type was still receiving much attention in 1923, and the examples before us are sufficient to reveal the great difficulty of procuring uniformity in the drafting of such laws. As most countries had already adopted hours of work laws, the greater part of the measures reproduced in the present volume of the Legislative Series are orders or decrees issued in pursuance of Acts published in earlier volumes. But fresh legislation on this subject was adopted in Italy by means of a Legislative Decree (*decreto-legge*), dated March 15, 1923, and British Columbia and three provinces of the Argentine Republic (Tucuman, San Juan and Salta) adopted eight-hour-day laws during the year. In addition, the elaborate Labour Code of the State of Jalisco in Mexico includes sections on this subject, and there was a new law in Sweden, but this is only an amended form of the Hours of Work Act of 1921, which needed to be re-enacted since, in accordance with a practice common in the Scandinavian countries, it was definitely limited in duration. The volume contains also the text of the much-discussed German Order making the formerly rigid rule of the eight-hour day in that country elastic by allowing extensions of hours, within limits, by trade union agreement, or by official permit, though not (as has sometimes been alleged), entirely sweeping away the principle of the eight-hour day. An Australian method of regulating hours can also be studied in the Queensland Industrial Arbitration Act, as amended and consolidated in 1923, though the general rules relating to hours laid down in s. 10 were only amended in points of detail in that year. The volume also contains a brief but comprehensive Chinese Factory Act which limits the hours of adult workers to ten a day. The Japanese Factory Act, which likewise appears, in its amended form of 1923, does not introduce any general regulation of hours of work. A number of laws or orders regulating the hours of workers in particular trades were also issued during 1923 in various countries, and there are several measures in the volume dealing especially with one aspect or another of the night work question.

Of the new laws of general application, the Italian is the most important. The Legislative Decree and its dependent regulations follow the usual lines of eight-hour-day laws in countries where the drafting of legislation is of little moment. Industrial and commercial undertakings, establishments for the purposes of technical education and philanthropy, offices, public works and hospitals are expressly included (without further definition), and the decree applies also, in a general way, to all places where work is performed for a salary or wages on account of another. The only occupations expressly excluded are those of domestic workers, managerial staffs and commercial travellers. But the hours of work of seamen and employees in public offices are to be the subject

of separate regulations, and only casual workers in agriculture are included, other forms of agricultural labour being left to be dealt with by special regulations, which were issued in the same year and appear in the Series. The general rule of hours is that they " shall not exceed eight hours a day *or* 48 hours a week," which is not in conformity with the Washington Draft Convention (where the word *and* was expressly used), unless the turn of the Italian phrase, whatever it may be, really gives a supplementing instead of an alternative effect to the conjunction. Incidentally this point provides an example of the subtle difficulties of language which are bound to become matters of great importance if ever the Conventions of the International Labour Conferences are to become real international law and not merely models of regulation to be followed more or less vaguely. Another point may be raised. The Convention contemplates exceptions for work that is " essentially intermittent." The Italian decree meets this point by providing that the limitation of hours applies only to " actual work," which is defined in such a way as to exclude any work not requiring assiduous and continuous attention ; a list of such occupations given in a subsequent decree shows that this provision gives an opening for great latitude in the application of the law. The rest of the legislative decree consists of exceptions ostensibly on the lines contemplated by the Convention. But s. 5, dealing with overtime, appears to be worded in so liberal a fashion as to override the main purpose of the law. It allows two hours overtime a day and twelve hours a week for an indefinite period merely by agreement between the parties. There is nothing in the wording of the text before us to prevent this overtime being worked every day in the year, and the Italian law is thus reduced to the same position as the German, except that the Italian worker is definitely to get 10 per cent. extra on his wages during his overtime. It may be that the intention of the Italian legislative authorities was only to allow spells of overtime during pressure of work (as contemplated in the Washington Convention). But this is not expressed in the text. Nor do the general administrative regulations under the law appear to place any limit to the number of days on which overtime may be worked nor to impose any conditions upon such overtime. They require agreements on which overtime is based to be submitted to the chief inspector for the district for approval, but they contain no rules to guide the inspectors in giving or withholding such approval. In effect the Italian law seems to allow the workers to contract out freely from the general eight-hour-day rule. The German Order (issued under the Emergency Powers Act of 1923) provides another example of legislation out of which interested persons may contract. In Germany the contracting-out must as a rule be effected by a collective agreement (*Tarifvertrag*), concluded by an association of workers with an employer or a group of employers. The provisions of the collective contract then take the place of the general rule for an eight-hour day (the German Order does not mention the 48-hour week). Failing a collective agreement certain authorities may,

after hearing the opinion of the works council, give revocable permission to individual undertakings to extend their working hours where this is desirable for technical reasons " or for general economic reasons." In either case the total hours may not as a rule exceed ten a day. It is interesting to compare this system with that of the French eight-hour law of 1919. In Germany the law applies until a collective agreement or official permit overrules it. In France the Act itself merely lays down a principle, which does not operate in practice until a decree, applying in a particular district or throughout the country, puts it into force, in each particular trade or occupation, subject to any desired modifications (of prescribed kinds). These decrees are usually based on a collective agreement; and if there exists any such agreement, it must be taken into consideration in framing the decree. In any case interested organizations of employers and workers must be consulted. Progress in the gradual application of the French law during 1923 is shown in the collection of decrees for that year, from which it appears that the Act was applied to the pottery industry, to certain retail shops and to banks and insurance offices, while some earlier decrees were amended. The high degree of elasticity possible under this system can be seen from the lists of exceptions allowed by the decrees. The task of inspectors endeavouring to check the observance of the law under either the German or the French system would seem likely to be very difficult.

The Act of British Columbia follows faithfully in most respects the wording of the Washington Convention. The most important difference is the omission of transport from the list of " industrial undertakings " to which the Convention applies. On the other hand, logging operations are expressly included. The Act also creates a special body for the administration of the Act. It is unfortunate for the International Labour Office that all countries are not willing to follow the example of British Columbia in reproducing, in general, the wording of the Convention in drafting their eight-hour laws, thus making it perfectly apparent if at any point they deliberately intend to diverge from its provisions.

Of the Argentine eight-hour laws that of the province of Tucuman appears to apply to every type of employment in industry, commerce, agriculture, transport, and " public and private establishments in general, even if they serve the purpose of vocational instruction." Overtime may be worked by agreement between workers and employers, with Government approval, so as to increase the working day to 10 hours on not more than 60 days in the year for indoor work and 90 days for outdoor work. Workers in Tucuman are to have 50 per cent. extra pay for overtime, as compared with the 10 per cent. given to their Italian comrades. The Act is followed by an administrative decree of the type common in a number of countries, namely, repeating, with added explanatory or administrative detail, the provisions of the Act. This decree has a few fresh provisions, which cannot be regarded as either explanatory or administrative. For instance, it excludes persons exercising supervisory

functions and domestic servants, a point not mentioned at all in the Act. The Act of San Juan is similar, but it expressly includes domestic service, and exempts, in an indirect fashion, all work in the open air not requiring great and continuous physical effort, namely, by prescribing for such employments a legal working day of whatever amount is required by the nature of the work. The Act of Salta applies only to the capital of the Province. It contains provisions on various subjects, in addition to the regulation of hours. If a strict interpretation of these Argentine laws were required, the same problem might arise as in the case of the Italian decree, namely, whether the 48-hour week is in each case compulsory at the same time as the eight-hour day, or as an alternative system. On the face of it, the 48-hour week and eight-hour day are both the rule in San Juan, and are alternatives in Tucuman and Salta. The chapter relating to hours of work (chapter iv), in the Code of Jalisco (Mexico), does not raise this question, as the 48-hour week is not mentioned. This Code prescribes an eight-hour day which is reduced to seven hours in the case of a night shift, and liberal overtime is allowed by agreement.

In addition to the decrees issued in pursuance of the French and Italian laws already referred to, the volume contains a set of orders under the Belgian Eight Hour Act of 1921. That Act is of the more rigid type, allowing modifications only by royal order either extending the scope of the law or permitting closely delimited exceptions, in some cases based on agreement between employers and workers. An interesting development of 1923 was the extension of the eight-hour rule to certain workers in hotels and restaurants. There are also decrees under the Polish hours of work law of 1919, and under the Netherlands Labour Act of 1919, the latter being of the carefully prepared and detailed type usual in Dutch decrees. A series of orders regulating overtime and shift systems in various occupations issued under the Russian Labour Code of 1922 may also be noted in this connexion.

Amongst the laws and orders regulating hours of work in particular trades, the Indian Mines Act is important. The greater part of the Act is concerned with health and safety, but the few sections relating to hours put into operation the standard laid down for Indian Mines by the Washington Eight Hours Convention, namely, the 60-hour week, and even improved upon it for underground workers, for whom a 54-hour week is prescribed. Turkey limited hours of work in the Heraclea coal-field to eight a day by an Act of 1921, which is printed in the volume as an appendix to welfare regulations of 1923 under the Act. A mining law also emerged in China during 1923, prescribing a day of ten European hours, exclusive of breaks, for underground workers in the larger mines worked under concession. Hours of work on railways were the subject of special legislation, direct or delegated, in Italy, Latvia and Switzerland. Seamen's hours were regulated by a Portuguese decree, and Sweden continued and amended her temporary Act on this subject and also her Acts regulating hours of work in commerce and in bakeries. The volume further

contains a shop hours law of Jamaica and an Italian Legislative Decree empowering the Government to issue regulations in the interests of dock labourers as regards hours of work and other matters. It must also be noted that Persia, in making a start with labour legislation, prescribed an eight-hour day in the carpet factories of two provinces. In Hungary there was legislation of 1923 on the allied question of night work. Act No. XVI of that year prohibited night work in a general way for all workers in industry with certain exceptions, such as technical necessity and the interests of the public. Night work in bakeries was also specially regulated by a Hungarian Act concerned with conditions of work in that industry. There were a number of laws in 1923 dealing especially and incidentally with the night work of women and young persons.

Relations between Employers and Workers.—Since the war it has been common for laws affecting conditions of labour to take special cognizance of employers' and workers' associations, by giving them powers of intervention in regulating conditions of work or requiring them to be consulted before official action is taken in pursuance of the law. Provisions of this nature have been noted above in connexion with the regulation of hours of work. The increased importance of industrial organizations is also reflected in attempts of recent years to regulate by law the relations between employers and workers or to provide means by which those relations may be improved. There has been a general (but not universal) movement in favour of giving greater freedom of association and assembly, and various systems of conciliation or arbitration have been established by law, usually giving the Government of a State or its officials, to a greater or less degree, power to intervene in the interests of industrial peace or providing machinery to which the parties may have recourse voluntarily for the settlement of trade disputes. The increasing tendency towards industrial organization and towards the recognition of the part played in the State by such organizations, as well as the activities of organs of conciliation, have greatly enhanced the importance of so-called " collective " contracts or agreements (called " industrial agreements " in Queensland). Several States have accordingly found it desirable to prescribe, in more or less detail, the means by which such contracts may be lawfully created and their legal effects. Developments in these directions during the year 1923 may be observed in the volume here considered.

Right of Association.—Let us take first the fundamental rights of association and assembly—rights so readily declared absolute in written Constitutions, and yet almost invariably restricted to some extent by law. These were directly effected by two Latvian Acts of July, 1923. Under the first of these the only restriction placed upon the formation of an association is stated to be that its activities and objects shall not be contrary to the laws of the State, whatever that may mean in practice. Associations are not bodies corporate unless registered. The creation of unregistered associations has to be notified to the police. For registration

application must be made by non-political associations to the District Court. The Court has a month within which to decide whether the proposed objects are contrary to law or not, and the Public Prosecutor has a right of protest, within three days, against the proposal of a Court to register an association. Political organizations have to seek registration from the Ministry of the Interior. The second Act deals with the right of assembly. The police must be given 24 hours' notice of a proposal to hold a public meeting, and a meeting may be prohibited by the Minister of the Interior if its objects are criminal or if it would endanger public peace and security. Open-air meetings are allowed on the same conditions except that a permit is required for an open-air meeting within a quarter of a kilometre of the Legislature in session, and the holding of meetings on railway tracks is, curiously, expressly prohibited, as well as in places of public traffic. It is illegal to obstruct " freedom of word and speech " at a meeting in Latvia, and on their part the speakers must not incite to, or praise, illegal actions. A permit is required for processions. The laws on these subjects of the Tsarist Russian regime and of the provisional Government of 1917, formerly applicable in Latvia, are repealed. The regulation of the right of association figures in the volume also in the Spanish Act of 1887, which is appended to a dependent decree of 1923, regulating the procedure for registering associations, the book-keeping of associations and the collection of contributions. It is convenient to have this law for reference. But, as in Latvia, the general principle laid down in the Act itself merely begs the question, since the essential registration of an association may be refused or the association may be dissolved, if it is deemed to be unlawful in conformity with the Penal Code. In the Code of Jalisco it is expressly stated that employers and workers have the right to unite for the defence of their interests, but the general principles of the right of association are not touched upon.

Conciliation and Arbitration.—Arrangements for conciliation or arbitration between employers and workers figure largely among the laws and orders of 1923. Sometimes we find organs of conciliation or arbitration set up expressly in connexion with particular trades. Such bodies may sometimes be used for merely individual disputes as well as for those affecting groups of workers. Examples of methods of conciliation or arbitration for particular trades or types of undertaking are to be found in the Austrian Act regulating contracts of work of estate employees; the amended German Home Work Act; the Greek law relating to seamen's work and unions; the special measures for dealing with disputes in agriculture of Hungary and Poland; decrees regulating transport services in Italy; and the special system of conciliation for disputes in State establishments set up by an Act of the Swiss Canton Fribourg. There are also in the volume references to the conciliation boards under the Swiss Federal Factory Act in supplementary or administrative measures adopted by the Cantons, and to means of dealing with disputes in connexion with the Italian hours of work law. On the other hand we find

a certain number of general systems of conciliation or arbitration set up by law. The practical working of statutory authorities created for this purpose depends so largely upon the psychology of the persons directly concerned (both conciliators or arbitrators and representatives of the parties) that the mere wording of the law becomes of minor importance. It is of interest, however, to compare the methods adopted in the more experienced industrial countries as regards the composition, procedure and powers of the various officials or bodies entrusted with duties of intervention in trade disputes. We may leave aside the aspirations of the Jalisco Code, with its rigid time limits for each stage of the proceedings (inquiry, conciliation, arbitration), its vagueness as to what arbitration means, and its chairmen chosen by lot. We must also leave on one side any detailed discussion of the 1923 edition of the Queensland Industrial Arbitration Act. It should be noted, however, that although the normal procedure under that Act is for application to be made to the Court of Industrial Arbitration to fix in detail the conditions of work and wages in a calling, and though the Court has in this respect powers of intervention and regulation far exceeding those of any arbitration body existing in Europe, yet the judge may intervene merely as a mediator in an industrial cause, where he deems this course advisable in the public interest, and first hold a conference before Court proceedings proper are instituted ; nor should the fact be overlooked that provision is made by the Act, in addition, for the constitution by the Minister of conciliation committees to inquire into a matter in dispute. Thus we find even in Australia, the home of binding arbitration awards, place allowed also for the methods more usual in Europe, where the normal procedure is, in the first place, friendly official intervention (either by request or uninvited) and official inquiry, followed if necessary by attempts to persuade the parties voluntarily to agree to accept arbitration, the procedure for which is regulated by law. Such are, more or less, the lines of the new Dutch Labour Disputes Act of 1923, which provides for the appointment of Government conciliators for districts, who may intervene in disputes of sufficient importance. Even in cases where the conciliator is precluded from officially accepting a request for intervention (for instance where the parties have a special arrangement of their own for conciliation), the Act is careful to state that he may, notwithstanding, give such advice as may seem likely to be helpful, and he may at any time assist in negotiations for drawing up a collective agreement. The conciliator has power to summon the parties before him to give him information, whereupon he may urge them to apply for the intervention of a conciliation board or to submit the dispute to arbitration. Then, according to circumstances, he may constitute a conciliation board by agreement with the parties, or appoint a special conciliator or act as conciliator himself if the parties so desire. If no agreement is reached by the conciliation proceedings, the board (or conciliator) may draw up a statement of its opinion on the points in dispute and its recommendations for a settlement, and may

publish the statement, unless arbitration is then agreed upon. Instead of entering upon conciliation proceedings, or subsequently, the parties may pledge themselves to accept an arbitration award by a sort of contract stating the constitution of the Court of arbitration, the terms of reference, etc. The Act also provides for the appointment by the Minister of committees to inquire into and report upon the circumstances of disputes affecting over 300 workers, where the ordinary conciliation procedure has failed.

The German Order (under the Emergency Powers Act, of 1923, and replacing earlier emergency provisions) also provides for official conciliators in "large economic areas," in addition to permanent conciliation committees appointed by the authorities of the several States. Here it is the committees who deal ordinarily with disputes, the conciliators intervening only "in cases of special importance to industry." Both committees and conciliators act on request or on their own initiative. The chairman of the committee (or the conciliator) makes a first attempt to bring about an agreement, failing which either the committee (the chairman with two assessors for each side) or the conciliator assisted by assessors takes the matter up and draws up an award. If this is not accepted by the parties, the German Order, unlike the Dutch law, provides for an important further step, by empowering the conciliator (or, in some circumstances, the Minister of Labour) to declare the award binding, if it appears reasonable and its application is desirable for economic and social reasons. Thus the German law contains the elements of binding arbitration without the previous assent of the parties, though it is left to official discretion whether or not the compulsory powers shall be brought into operation.

The volume contains in addition a Hungarian Order establishing a system of conciliation for serious disputes by attaching official conciliators to the industrial inspectors in their respective districts, and an order respecting conciliation boards and arbitration courts was issued in Russia in 1923 in pursuance of the Labour Code of 1922. The jurisdiction of those Russian boards and courts is voluntary, except in the case of public undertakings, when it appears that the trade unions can demand arbitration. The chairmen of the boards and courts have no vote. They merely "co-operate" in the proceedings. A Spanish decree on the subject of strikes and lock-outs provides a procedure beginning before official intervention, by making it compulsory on employers to recognize and negotiate with trade unions registered in the prescribed manner. The unions, on their side, are bound to hold special meetings of their members to formulate demands and expressly appoint representatives to carry on the negotiations. If these fail a joint conciliation committee is officially appointed *ad hoc*, and arbitration may be resorted to voluntarily.

Collective Contracts.—It is possible, from the collected laws of 1923 before us, to make a superficial comparison of the means prescribed in

four very different countries for making a labour contract which shall be binding on a group of workers, on the one hand, and a single employer or a group of employers, on the other. For the volume contains laws of Germany, Queensland, and Jalisco (Mexico) dealing with this subject as well as Russian Orders based upon the Labour Code of 1922. A number of interesting legal points arise from this legislation. Having examined any prescribed formalities as to the manner of concluding valid collective contracts of work in any country or as to the nature of the associations competent to conclude them, we are at once confronted by the question of the sense in which a collective contract, lawfully concluded, is in effect binding. From the nature of the case, the elements forming one at least of the parties are apt to be continually changing ; the law must decide whether newly acquired members of a trade union or association shall automatically become bound by agreements entered into by the group, and whether retiring members shall likewise remain bound. The question also arises as to the position relatively to the contract of unorganized workers employed by an employer who is a party to a collective agreement, and by what means, if any, a partially applicable collective contract can become an enforceable rule for a whole industry. Again, once a collective contract of work is legally concluded, the law must determine its effect upon any concurrent contracts of individual workers coming within its scope. There is also the important question of collective liability for a breach of a collective contract. This might be expected to turn upon the manner in which, from the legal point of view, a collective contract is regarded, and thus leads us to consider the problem of what is the real nature of a collective contract ; is it an instrument having a legal status of its own, or a bundle of individual contracts of work, or a mere model for individual contracts, or even a set of regulations akin to delegated legislation ?

The laws affecting collective contracts, here considered, touch upon all these points. In addition to requiring collective contracts to be in writing, these laws (with the exception of that of Germany) all regulate to some extent the form of any such contract and the term of years for which it may be concluded. In Jalisco and Russia official registration is essential in order to give a collective contract validity. In Russia the main purpose of this registration is to check contracting-out from statutory provisions regulating conditions of work and wages. Any terms in a collective contract sent for registration found by the authorities to be contrary to such provisions are cancelled. If a collective contract remains unregistered it is invalid, and any dispute purporting to relate to its terms has to be settled by reference to the conditions of work prescribed by law regardless of the contract. In Queensland industrial agreements must be filed with the industrial registrar. In Germany collective contracts do not, in general, appear to need registration to ensure their validity, but they must be notified, for information, to the employment exchange authorities and to industrial inspectors. They are

only registered if declared generally binding in the manner mentioned below. The question of what type of organization is admissible as a party to a collective contract is not touched upon by the German Order. The Russian Labour Code does not authorize the existence of trade unions at all unless affiliated to the recognized central federations. In neither Queensland nor Jalisco can an unregistered trade union be a party to a valid collective agreement. The object of this registration in Queensland is largely to prevent overlapping with existing unions and to ensure that bodies ostensibly trade unions shall exist *bona fide* in the interests of the workers. In the Jalisco Code a minimum membership is prescribed for registration and the absence of political or religious objects. Once lawfully concluded and duly filed or registered a collective contract becomes binding in Queensland and Russia upon the parties and members of associations concerned and also expressly upon every worker, whether a trade unionist or not, employed by an employer on whom the agreement is binding. The rule in Germany and Jalisco brings within a collective contract all members of an association at the time of its conclusion and also persons subsequently joining. It appears that in neither of these countries are non-unionists bound by a collective agreement even when in the employ of an employer who is a party to it. But the German Order makes clear that subsequent resignation from an association does not release an individual from its terms. In Germany and Queensland a partially applicable collective contract may be declared the common rule of a whole calling (within a stated area). This is effected in Germany by the Federal Labour Office on request, and in Queensland by the Court of Industrial Arbitration declaring that the agreement shall have the full effect of an award of the Court, after having given the parties an opportunity of opposing the proposed extension. The possibility of extending the scope of a collective agreement in this way is not contemplated in the laws of Russia or Jalisco. In all the countries in question a collective contract is given precedence over individual contracts, and it cannot be less favourable than standards fixed by legislation, except, of course, where that legislation itself expressly allows deviations by collective contract, as in the regulation of hours of work in Germany mentioned above. But individual contracts more favourable to the worker than a collective contract are allowed to stand unless (as is provided in Germany) the collective contract expressly forbids the conclusion of such individual contracts.

The texts of these measures still leave obscure the real nature of a collective contract. In Queensland and Germany, once a collective agreement is made the common rule, it would seem rather to acquire the character of delegated legislation. But one may deduce from the text of the German Order that lawyers in that country regard a collective contract as containing standard terms on which the individual contract of each worker is held to be based. The phrasing of the Jalisco Code (as translated) seems to imply that a collective contract is to be treated

exactly as if it were an individual labour contract. This is borne out by the facts that it is expressly subjected to the same conditions as are laid down in the Code for individual contracts, and that an organization is responsible in its corporate capacity for breach of a collective contract to which it is a party. In Russia a collective contract seems to be regarded as setting the standard for individual contracts of work, and the assets of a trade union are expressly declared not to be liable for the fulfilment of collective contracts.

Conclusion.—These brief indications of points arising from perusal of a very small proportion of the texts published in the Legislative Series of a single year suffice to give some idea of the great importance of the work that is being done by the International Labour Office in collecting labour laws and regulations from the four corners of the globe and in sifting and translating them and making them available to the general public. Apart from assisting the work of societies of comparative legislation, necessarily much interested in collections of this kind, we suggest that the Legislative Series is effectively helping towards the attainment of the main object of the International Labour Organization of the League of Nations, namely, the creation of an international standard of legislation on industrial matters. One of the surest means to that end is to make universally available the fullest possible information on the labour laws of every country. There is no legislator preparing or endeavouring to improve upon a bill on some question ripe for legislation in his own country, but will gladly, if he can, " pick the brains " of other Legislatures and use their experience as a basis for his own efforts. In publishing translations into three languages of the most important labour laws of the world the International Labour Office is going a long way towards providing the information required, and we hope they may continue and develop this side of their work.

FAMILY PROPERTY IN BEAUMANOIR: A STUDY IN COMPARATIVE LAW.[1]

[*Contributed by* S. G. VESEY-FITZGERALD, ESQ., M.A.]

MAINE (*Ancient Law*, ch. viii) : "*Ancient Law . . . knows next to nothing of individuals. It is concerned not with individuals but with families, not with single human beings but with groups. It is more than likely that joint ownership and not separate ownership is the really archaic institution.*"

"*Per contra* MAITLAND" (*Collected Papers*, II. 312) : "*That land was owned by communities before it was owned by individuals is nowadays a fashionable doctrine . . . this doctrine is as little proved and as little probable as would be an assertion that the first four rules of arithmetic are modern when compared with the differential calculus.*"

If any man were so foolhardy as to attempt an estimate of the relative eminence of Maine and Maitland, it would be most unfair thus to take their extreme statements omitting the qualifications with which they themselves hedge them about. Nobody has used stronger language about the individual ownership of the primitive *paterfamilias* than Maine ; and the apostle in England of von Gierke's theory of association, the theory that corporations are born not made, could not be blind to the quasi-corporate character of the oldest and most vital of all human fellowships. These shorn statements, however, though they do not fairly represent their authors, do represent the poles between which the opinion of scholars has oscillated : and not only opinion but the very right about which the opinions have been held. In any system of law of which we have a fairly continuous history we seem to see the battle eddying to and fro between the two conceptions. Thus in India the patriarchal individualism of the *Shastras* gave way to the family communism of the Mitakshara, against which the Dayabhaga in its turn represents an individualist revolt. Thus, again, if in Roman law of the

[1] Philippe de Remi, sire de Beaumanoir, is famous as the author in early life of, perhaps, the first Oxford novel (though it has nothing to do with the University), the *Roman de Jehan et Blonde d'Oxford* ; and as the author in middle life of the greatest mediæval French law treatise, the *Coutume de Beauvaisis*, founded on his own experience as *bailli* or judge of Clermont in Beauvaisis in the service of Robert of Clermont, second son of St. Louis. This was written between 1279 and 1283 : the best edition is by Salmon (Picard, Paris, 1899, 2 vols.) ; and references in this essay are to the sections in that edition. The best short account of Beaumanoir for English readers is in *Roman Law in the Middle Ages*, by the late Sir Paul Vinogradoff, whose encouragement and criticism of the present essay, originally read in his Seminar, are gratefully acknowledged.

historical period the balance between the two conceptions sometimes fluctuates, there are not wanting traces of more violent fluctuations in prehistoric times: *familia* seems to be connected with agriculture[1] and settled life, *peculium pecunia* with a perhaps more primitive pastoral state. Indeed it might not be beyond the bounds of possibility to rewrite a good part of the history of our own Land Law, giving that overworked bogey, "feudalism," a much-needed rest and tracing at any rate many of its peculiarities to this same age-long struggle between the individual and the family. In particular the doctrine of estates tail can only be ascribed to "feudalism" if we stretch that word to cover not only the whole social conditions of the thirteenth century and even earlier times, but also a large part of the social conditions of the reign of Charles II.

On the history of our law of realty Beaumanoir provides a useful sidelight. Through the clear eyes of a lawyer of more than ordinary perspicacity and wit, the Maitland or the Bowen of the thirteenth century, we see the relation between the family and the land as it existed among our kindred in Northern France at the end of the thirteenth century. In some ways—an approach to equality between the sexes, for example—Beaumanoir is in advance of his English contemporaries, but in others the picture which he gives us is of a state of family life which they have left behind. Forisfamiliation, for instance, which Bracton definitely states to have been obsolete in the England of his time (but see below), is still living law in Beaumanoir. Bracton's Family, in spite of his attempt to apply to it the vocabulary of Roman law, is not very different from an ordinary English family of to-day; Beaumanoir's raises problems which go near to the beginnings of Aryan family life.

What is the relation in Beaumanoir between the family and the individual and between both and the land? Is there in Beaumanoir a quasi-corporate family striding along from generation to generation, or is the family merely an expression of the individual coming to a necessary end on his death? Are the rights of sons in their father's inheritance those of co-sharers with their father during his lifetime or merely rights of inheritance more or less indefeasible—such as Pollock and Maitland (*H.E.L.* II. vi, § 1) call "birth rights"? Does death of necessity involve the distribution of the family property? And to what extent is that distribution possible apart from inheritance? And, if we conclude that there is nothing in Beaumanoir which can fairly be called a joint family in the strictest sense of that word, then what is the nature of the force which holds the family together?

Eritage.—*Eritage*, inheritance, is from a lawyer's point of view the most important word in Beaumanoir in this connexion, and it is significant that the first thing which occurs to his mind when he wishes to discuss *eritage* is partition, *parties d'eritage*[2]: of this more hereafter. The

[1] Cato, *De Re Rustica* 138, 149 (6 and 7), where the *familia* means the agricultural as opposed to the pastoral cattle.

[2] § 461.

connexion of *eritage* with agriculture is obvious; for *eritage* means only land and such things as by the economic arrangements of the period went with and were assimilated to land[1]—the justice of a town, the receipt of tolls, the mill, the village bakery and the like. *Eritage* is contrasted with *meubles*[2] and *bourse*[3]; realty with chattels or cattle, *familia* with *pecunia*. The absolute right of the individual over his *meubles* and his *bourse* has never for a moment been questioned. He can do what he likes with it in his life and leave it all away from his children,[4] if he pleases, after his death. But with his *eritage* it is otherwise. Over a fifth part of it, which represents the *pars defuncti*, he can exercise an unrestricted right of bequest and will no doubt wish to do so for the good of his soul. But even that fifth he must not leave to one child rather than another, unless indeed the favoured child can persuade that discerning judge,[5] the bailli de Clermont, that the preference involved is not *outrageus*—and it seems to be implied that so marked a preference will ordinarily be *outrageus*.[6] A trifling preference he may express[7]; but, subject to it, every child has an absolute right in the *eritage* which cannot be defeated by its parents either by testament or otherwise; nor does the parent ever possess (*si je ne li mesfès*, a significant exception to which we will refer later) the power of disinheriting a child in favour of that child's children.[8] Indeed even the parent's power to express a trifling preference seems to arise from his power as the executive head of the family to decide that partition after his death shall be carried out in some specified way. He may devise this or that piece of property to the share of this or that child[9]; and, since value is largely a matter of opinion, the parental division, unless manifestly unequal, must be respected. It is further significant of the connexion between our modern law of realty and the patriarchal family that the word *oirs*, heirs,[10] in strictness means only heirs of the body. Inheritance by them is *descendemens*;[11] inheritance by any collateral, even a brother, is *escheoite*,[12] that is to say, failure of the family. *Eritage*, too, is not only feudal land but also land held in what Beaumanoir calls *vilenage*, *i.e.* by a free but non-military tenure; the English *socage*. In *vilains eritages* sons and daughters share alike; and we need have no hesitation in accepting this as the older law. Even as regards fiefs, the victory of primogeniture has not been so complete as in England; the right of the eldest son is restricted to the principal mansion-house, two-thirds of the inheritance and the homage of his brothers and sisters; and daughters take a share in fiefs even in competition with a son.[13]

[1] § 656. [2] § 365.

[3] § 487, *bourse* is simply *argent en main*; it may be the income of the *eritage*, but so long as it does not arise from the sale of the *eritage* itself, it is private property not subject to family rights.

[4] § 365. [5] § 1972, *ad fin.* [6] § 365. [7] § 482. [8] § 1975.

[9] § 776. [10] § 474. [11] § 462. [12] § 463.

[13] §§ 434, 435. Contrast Lex Salica, LIX. 5. The daughters actually claimed a preference over the son, but on other grounds.

Eritage, therefore, is an expression of family solidarity; of necessity it has a stricter and narrower meaning than our realty: it is contrasted not only with *meubles* and *bourse*, but with *acquès* and *conquès*.[1] These are lands, realty, which a man has acquired for himself, as opposed to those which he has inherited; he can leave his *conquès*, like his *meubles*, completely away from his children, *e.g.* to his step-children[2]; and if he chooses to sell during his lifetime that which he has bought none of his lineage have any right of pre-emption. But if he does leave or give in his lifetime (as he naturally may do) his *acquès* or his *meubles* to his children, he will be bound by the same rule against *dons outrageus*[3] as in the case of the *eritage*. *Si tost comme l'acqueste vient a ses oirs*, immediately the self-acquisition comes to his issue, it becomes *propres eritages*[4]: not more than a fifth part of it may be bequeathed, and if alienated by those who inherit it, it may be pre-empted by their heirs. One may not unreasonably compare the similar rule in Mitakshara law determining when "self-acquisition" becomes "ancestral property"; and as in Hindu law, the case we shall now cite would seem to show that there was sometimes doubt whether an acquisition was not really based on family funds.

It would appear also that the family property, the *eritage*, may be followed like modern English trust funds, or again like Hindu family property, through various conversions. A knight and his lady, we are told, bought a fief *en l'eritage du chevalier*[5]—which must surely mean that they used to pay for it money obtained by the sale of other *eritage* of the knight which in law is merely replaced. The case, however, is from this point of view not quite clear, being cited by Beaumanoir for quite a different reason: the knight, on his lady's death, feeling apparently that the source of the acquisition might be questioned, deemed it advisable to exercise against their children a right of pre-emption in the half of it which might be regarded as hers.

This was a case of *retrait* which was not *retrait lignager*. *Retrait lignager*[6] arises only where I, the pre-emptor, can prove that you, the vendor, have sold or exchanged to a stranger *eritage* which descended to you from a common ancestor of us both. It does not matter that I am merely a collateral to you the vendor, provided I can prove that the property was inherited by you from someone from whom I also might have inherited it by *descendemens* and not by *escheoite*. If that is so, my rights are the same whether the vendor be my own father or merely my cousin—a fact which forcibly illustrates the nature of the distinction between the birth-right which I hold under the patriarchal system and the position of a coparcener or corporator in the more elaborate joint family system: I have a right to recover the property, but only on giving compensation for it. This is an assertion of family right, but an equally emphatic

[1] Beaumanoir uses these words as interchangeable; in other mediæval French law *acquès* is self-acquisition before, and *conquès* after, marriage; but the distinction is not important.

[2] § 1973. [3] § 1972. [4] § 505. [5] § 487. [6] §§ 1364, 1363, 1357, 1358.

denial of family communism, for, had I been a co-owner, the sale would have been a nullity without my authority, express or implied, and there could have been no question of compensation.[1] Indeed, a son living joint with his father could hardly be in a position to assert a right of pre-emption, for, as we shall see, it is expressly stated that he has nothing of his own. In many parts of France an estoppel was raised against possible pre-emptors by the practice of *laudatio, i.e.* by obtaining their attestation to the deed in token of their approval. This obvious expedient obtained also in England (as indeed it does in parts of India to-day); and, though Beaumanoir does not mention it, he can hardly fail to have been cognizant of it. It does not, of course, affect the nature of the right estopped, which, for instance, may arise from mere neighbourhood or a common liability.[2] In Beaumanoir the right which gives rise to pre-emption is *eritage*, a right of succession which accrues at the birth of the successor but does not become a tenancy in fee till the death of the ancestor.

"Celle."—So far we have seen nothing of which Maitland's doctrine of birthrights would not be amply sufficient explanation: and from the point of view of property only, that doctrine is sufficient until the borderline between the patriarchal family and the joint family is past. But, as Maitland himself would have been the first to admit, we cannot, in dealing with the lay mind of the Middle Ages or of the more primitive times, isolate a single department of law. We shall not understand the extreme individualism of Beaumanoir unless we realize also the strong family life.

The word "*Celle*" may be taken for a keyword; for, though the word itself is of rare occurrence and Beaumanoir's latest editor surmises it to have been something of an archaism, the thing represented was still the normal family life throughout France. Other words which express the same conception are *mesnie*, household, a word which occurs frequently in Beaumanoir as descriptive of dependents and is sometimes used loosely of any kind of retinue,[3] and *mainburnie*, or protection. Unmarried children of all ages normally live with their parents under the parental roof-tree, sharing the parental meals and the parental prosperity and adversity, but having no independent means of their own. They are said to be *en celle* [4] to their parents or *en la mainburnie*,[5] and it is expressly said that *li enfant qui sont en la mainburnie la père et la mère n'ont riens, soit qu'il aient aage or non aage*. This is the normal situation, and it is the exception rather than the rule for children to become *sui juris* before the death of their parents. Indeed, but for this one paragraph, Beaumanoir does not contemplate it as happening except on the marriage of the child. Elsewhere marriage and emancipation are treated as identical.

[1] The modifications which English lawyers have introduced into this principle in parts of India are outside the scope of this essay.

[2] Neighbourhood as sometimes in Islamic, or common liability as in some systems of Anglo-Indian Land Revenue Law.

[3] *E.g.* the *mesnie* of a court of justice = its bailiffs, process-servers, etc.

[4] § 498. [5] § 640.

That they should be identical is an almost inevitable consequence from the high position which the wife occupies in Beaumanoir. Indeed a greater contrast with the early Roman wife, *filiæ loco*, or even with the disability of the English *feme covert*, it is difficult to imagine. Not only has the wife her dower, not only has she her separate property in the *eritage* which she derives from her ancestors, but she is not *en mainburnie* to her husband; and throughout Beaumanoir she is regularly spoken of as ruling their joint establishment along with her husband, a state of affairs which anticipates the modern French *régime de communauté des biens entre époux*. The children, as we have just noticed, are under the *mainburnie*[1] of father and mother; a knight *and his lady* purchase property *en l'eritage du chevalier*[2] (this is obviously a strong case); a son is spoken of as being married by his father *and* mother[3]; father *and mother* may show a small preference for a child who is emancipated during their lifetime,[4] and even if outrageous *they* may warrant it during *their* lifetime.[5] All this is natural enough in the land of chivalry. The high position of women is further illustrated by the strictness with which the rule *paterna paternis, materna maternis* is applied, and by the rights of daughters in inheritance.[6]

Marriage also implies emancipation because it means setting up a new economic unit; the daughter-in-law cannot enter into the *celle* or *mainburnie* of her husband's parents; and provision for the separate maintenance of the new household has got to be made by both the families of whose alliance it is the outcome.

It follows from the economic dependence of the children *en mainburnie*[7] that the parents must be responsible for their wrongdoings (*mesfets*), so far as they can be atoned for by fine or damages, even though they are in no way accessory or privy to them.[8] For my *mesfets* towards him, my father may even disinherit me,[9] though apparently he must not disinherit my children in so doing; and in order to avoid pecuniary liability for their wrongdoing towards others father and mother may emancipate each of their children as they come of age.[10] They may place them *hors de leur main et de leur pain et de leur pot et de leur mainburnie*, either by themselves or in marriage or by sending them to service away from home,[11] or by

[1] § 640. [2] § 487. [3] § 478 *ad fin.* [4] § 482 *ad init.*
[5] § 482 *ad fin.* [6] §§ 434, 435.
[7] § 640. For crimes *duquel l'en doie perdre vie* they will only be liable if accessories; *cf.* ch. xxx.
[8] Compare the modern American "doctrine of the family automobile."
[9] § 1975. [10] § 640.
[11] *E.g.* as squire or page to some great lord or the King, or as apprentice to a merchant. This is strictly not emancipation, but a mere transfer of *potestas*; but it is interesting as showing that the *mainburnie* arises from the tie of householder and dependent rather than from that of kindred. One may, perhaps, speculate on the Roman *mancipium* having had similar educational uses; *cf.* also fosterage in Ireland.

giving them a portion of land on which they can maintain themselves without fraud.[1]

Probably in Beaumanoir's day the normal course was for each child to be married as he or she came of age and to set up a new economic unit. Early marriage and large families are for economic reasons the normal rule in agricultural societies—as the Tudor and Stuart brasses in our country churches so often remind us. Beaumanoir therefore is not guilty of more than a superficial contradiction when he implies in several other places [2] and definitely states in one that marriage is the only possible reason, if not for emancipation, at any rate for an advancement of property [3] upon emancipation: "*et la coustume si est tell que se j'ai frères ou sereurs, nostres pères ou nostre mère ne me puet donner fors ce que coustume de terre donne que mi frère et mes sereurs n'i puissent partir après son deces exceptés les dons de ceus que pères et mères marient.*"

This is spoken of as *dons*, a gift, not as *parti*, partition; and a consideration of the rules with which it is hedged about will show clearly that it is very much more closely akin to our modern English ideas of an advancement than to Hindu ideas of partition. During their lifetime the father and mother can make what gifts they please to any of their children; and for the space of their lives the gift, however outrageous it may be, will hold good, for "it belongs to father and mother to guarantee their gift during their lifetime" [4]; in other words, the *life* estate at any rate is the property of the father and mother to do as they like with. But the absolute property in the gift does not enure to the married child—that is to say, the real partition of the *eritage* does not take place till the father and mother die. Not till then is it certain how many children are to share the inheritance: a gift on marriage might be perfectly reasonable at the time it was made, but be rendered "outrageous" by the birth of subsequent children to either parent.[5] Thus the gift, though from the parental point of view it is a gift, is from the filial point of view only a *bail*,[6] something for which, if it exceeds the limits which the *estimacion de loial juge* sets to parental preference, the favoured child [7] may be called to account; and if, whether of his own motion or under compulsion he brings it into hotchpot, he is strictly liable for conversion,[8] or waste,[9] at the same time that he is not allowed to profit by improvements.[10] The reason for this last rule is specially instructive: "*car l'amendemens qui est fes en l'eritage qui puet revenir en partie doit estre ou pourfit de chascun de ceus qui partie i pueent avoir.*" The advancement in fact does not become absolute property till the partition of the inheritance, and that can only take place on the parents' death. This is illustrated again by what happens when the favoured child dies without

[1] Such an advancement may, perhaps, have been revocable by the parents in cases where it did not form part of the treaty of marriage alliance with another family. This hypothesis would remove the contradiction.

[2] §§ 1972, 477, 482, 503. [3] § 1975. [4] § 482 *ad fin.* [5] *Cf.* § 434.
[6] §§ 479, 481. [7] § 1972. [8] § 479. [9] § 481. [10] § 480.

heirs of his body.[1] His inheritance does not escheat to his brothers and sisters; it is, as it always has been, in some sense his parents' property and goes back to them: for it would be, says Beaumanoir, an evil thing if the father and the mother were to lose not only their child, but their property also. One is more easily consoled for a single loss than for two; and the knowledge that the property will not be absolutely lost to them may encourage parents to give freely to their children.

The *eritage* of Beaumanoir, in fine, is more closely akin to the *patrimonium* of Roman family law than to anything which Hindu law of either school or Slavonic law can show. It cannot be completely[2] broken up except by the death of the parents; and on their death, as on the death of a Roman *pater*, it must be broken up. As we have already pointed out, the first thing that occurs to Beaumanoir's mind in connexion with *eritage* is its partition in inheritance or escheat on death.

The *mises hors de pain et de main* mentioned above are in Beaumanoir simple emancipations of dependents effected by the heads of a household: and it used commonly to be supposed that this was the only meaning of the ceremony. M. Roger Grand, however, of the École des Chartes, has discovered in the Cartulary of the town of Provins-en-Champagne,[3] instances of mutual *desaveu*, *e.g.* by two sisters of one another, which make it certain that in Provins at least (and, if one may infer as much from the very brief account of M. Grand's paper, all over the north of France), it was common for a *mesnie* to be held together and to enjoy its family estate in common after the death of its head. If so, it would certainly be arguable that the decisive step had been taken across the line which separates the purely patriarchal from the joint family. Instances such as those which M. Grand has collected may, no doubt, have arisen in Beauvaisis also. But Beaumanoir takes no notice of them. His chapter xxii, "Des Compaignies d'eritage," is not really concerned with *compaignie* in the original sense of "a sharing of bread," but with those occasional cases in the partition of inheritance where some one stubborn item of property cannot be partitioned and must therefore continue to be held in common even though the several shares in it have been ascertained. This is a familiar position in Hindu law, and indeed in Mohammedan law also, although the latter knows nothing of the joint family. Beaumanoir's instances we have already mentioned—the justice of a town, the mill, the bakery, the fishery, the winepress, and the right of tolls; and he obviously regards the litigation which arises out of these cases of separate property but common enjoyment as one of the

[1] § 493.

[2] The gift of *peculium* on emancipation of a son under the Roman law seems to have been more absolute than such advancements as we have just been discussing. But the *actio familiæ erciscundæ* would not lie in a father's lifetime. The prodigal son cannot insist "Father, give me the portion of goods that falleth to me," as he can in Mitakshara law.

[3] *Compte rendu du V^e Congrès International des Sciences Historiques*, Bruxelles, 1923, pp. 270–1.

most wearisome parts of a judge's duties—a view in which he has the respectful sympathy of any judge who has had to try "village profits" cases in India.[1] He heads his chapter "Of Companies of Heritage and how to work them," and he has to rely on the vigorous intervention of the overlord to make them work at all. For the unpleasant fact about these cases is that they are separate property, even though the possession is joint: there is no common fund for their maintenance; the burdens, when they occur, must be borne by a special levy; and generally one or more of the partners will find an excuse for refusing or will simply refuse without excuse to contribute to that levy. For such conduct the interposition of the Court is necessary; and Beaumanoir has a summary and common-sense remedy. He that will not pay, neither shall he share. If the levy is adjudged necessary and he refuses to pay it, he loses his title altogether. But what about the profits? The thing being merely a joint possession, and not a joint property, profits must be divided at once; and it is perfectly marvellous what self-sacrificing people the managers of these troublesome possessions can be. For years, according to their own account, they have spent more on maintaining the property than they have been able, with a care amounting almost to genius, to get out of it. Yet they are anxious to continue this ruinous course and indignant that the sharers should doubt their complete disinterestedness. On this aspect of the case, however, Beaumanoir's experience may have been happier than the present writer's—for he says nothing about it, and goes on to an amusing, but, from our present point of view, irrelevant discussion of the disadvantage of having a single seat of justice with several occupants.

Beaumanoir, in fine, is definitely with Maitland in holding the conception of birthright a sufficient explanation of the family property of his day. The lawyers are on one side; the social economists, perhaps, might be on the other. May we conclude, as it is fitting that historical discussion should conclude, with a reference to the present day? For six centuries at least English law has refused to recognize the joint family save in the attenuated form of estates tail; and Bracton, as is well known, is hard put to it to apply the language of the Roman *patria potestas* to English conditions (Bracton, *De Legibus*, F 6). Yet among the more backward sections of our population, among small farmers for instance in old-fashioned country villages, it is by no means uncommon to-day for a son, even to forty years of age or more, to remain *en la mainburnie* of his father, ruled by the latter in everything and working for the common ends of the family without wages or even definite pocket-money. Indeed, some forty years ago, a close observer of English country life gave a classical account of a family which was not only patriarchal but joint. Blackmore's *Cripps the Carrier*, though only a

[1] § 657.

novel, can hardly fail in this particular to be founded upon fact. The different items of the Cripps family property, though separately enjoyed by their possessors, were redistributed in each generation by a process entirely unknown to English law, a process which affirmed the continuance of the family and the predominance of its eldest male member at the same time that it expressly denied the right of individual succession. "The children of the former Exodus were turned out testamentarily save those who were needed to carry the bread till their cousin's boys should be big enough." Half-way through the book the head of the family definitely though not very successfully asserts his position as the eldest male. In the last chapter Leviticus Cripps is forisfamiliated *par cause de mesfet.* This is done without even reserving an interest (such as Beaumanoir would have required)[1] to his children; and in successful defiance of such newfangled lawyer's devices as mortgages and bills-of-sale. Not till the Carrier had raised up a new generation of Crippses was the old swine farm in Stow Forest again tenanted by the third son of the ruling patriarch. One sometimes feels tempted to wonder whether Lord Morley's "long, slow procession through all the centuries" is not almost as true a description of the English as of an Indian country-side. And even those who recognize the inevitable consequence of progressive death duties and modern economic conditions may be permitted to regret the establishment of the indivisible legal estate and the severance of the historic connexion between the family and the land.

[1] § 1975.

FOREIGN CORPORATIONS IN INTERNATIONAL PUBLIC LAW.

I

[*Contributed by* E. H. Feilchenfeld, Esq.]

The position of trading and other corporations in international public law is a problem which is discussed only in a few of the well-known textbooks on international law.[1] By far the greatest part of the existing literature on the legal position of foreign and other corporations discusses only the problems which arise in the different systems of municipal law and international private law. It is only since 1914 that the relevant problems of international public law have been more frequently raised. There is hardly yet any universal agreement amongst the courts and authors, and while some of the continental authorities seem to be somewhat more optimistic, the English authorities on the subject—Schuster[2] and McNair[3]—state clearly, and I think rightly, that they consider the problems of international public law as still unsettled.[4]

[1] *Cf.* Calvo, *Le Droit International*, 5th ed., ii, s. 727 ff.; Wharton, *A Digest of International Law in the United States*, p. 207; v. Bar, *Lehrbuch des Internationalen Privat-und Strafrechts*, p. 52; Moore, *Digest of International Law*, vol. iii, s. 485; Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 41, 617 ff.; Liszt, *Völkerrecht*, pp. 99, 105; Garner, *International Law and the World War*, vol. i, p. 217; Oppenheim, *International Law*, 3rd ed., vol. i, p. 463; Fauchille, *Traité de Droit International Public*, 8th ed., p. 973.

The problem is not mentioned at all in Bluntschli, *Das Moderne Völkerrecht der civilisierten Staaten*; Phillimore, *Commentaries upon International Law*, 3rd ed.; Lorimer, *The Institutions of the Law of Nations*; Travers Twiss, *The Law of Nations*, 2nd ed.; Pradier-Fodéré, *Traité de Droit International Public*; Holtzendorff, *Handbuch des Völkerrechts*, 2. Bd.; Walker, *The Science of International Law*; Rivier, *Principes du Droit des Gens*, Tome I; Piedelièvre, *Principes de Droit International Public*; Heilborn, *Das System des Völkerrechts*; Gareis, *Institutionen des Völkerrechts*, 2. Aufl.; Taylor, *A Treatise on International Public Law*; Despagnet-de Boeck, *Cours de Droit International*, 4th ed.; Wheaton, *Elements of International Law*, 4th ed.; Nys, *Le Droit International*, Tome II; Ullmann, *Völkerrecht*; Mérignac, *Traité de Droit Public International*; Halleck, *International Law*, 4th ed.; Hall, *A Treatise on International Law*, 9th ed.; de Louter, *Le Droit International public Positif*; Strupp, *Grundzüge des Positiven Völkerrechts*, 2. Aufl.; Wilson, *International Law*.

[2] "The Nationality and Domicil of Trading Corporations," *Grotius Society Transactions*, vol. ii, p. 58.

[3] "The National Character and Status of Corporations," *British Year-book of International Law*, 1923–1924, p. 44.

[4] For the history of the problem *cf.* Young's *Foreign Companies and other Corporations*, 1912, pp. 7–19.

The following pages do not claim to contain any final solutions, but only try to make some steps forward in the elucidation of the problem by attempting to suggest one of several possible ways of looking at the matter.

Having regard to the well-known definition of Oppenheim (vol. i, p. 1)—

> The Law of Nations . . . is the name for the body of . . . rules which are considered legally binding by civilized States in their intercourse with each other,

the proper and exact formulation of our problem would be: "What are the rights and duties concerning trading corporations which are recognized as binding upon States by international law?"

I. Territorial and Personal Sovereignty.—In the sphere of international law, writers distinguish between territorial and personal sovereignty. Every fully independent State is, generally speaking, at liberty to do within its territory whatever it likes. Thus, if one speaks of territorial sovereignty, the meaning is that the boundaries of the territory are at the same time the border-lines of the sphere of sovereignty.[1]

Although the question is generally not raised, it seems doubtful whether one can speak of personal sovereignty in the same sense as one speaks of territorial sovereignty. There seems to be an important difference between the two kinds of sovereignty. Anybody and anything within the State territory is at least potentially within the reach of the organs of such State, but a subject abroad is beyond the reach of the Government of his own State. For the home State is not able, and not even entitled by international law, to deal with its subjects abroad as it pleases. Subjects at home, for instance, may be compelled by physical force to enter the army, but it would be a breach of international law if the French Consul in Barcelona were to try to transport French subjects from Barcelona to the French frontier against their own will and without the authority of the Spanish Government. What is usually called personal sovereignty is in reality only a complex of rights of the home State to claim that other States may:

(*a*) Abstain from certain acts against the nationals of the home State;

(*b*) Grant certain rights to such nationals; and

(*c*) Grant certain rights to the home State in respect of them.

Thus, while the rights arising from the territorial sovereignty may be safely compared to a *jus in re*, the rights arising from the so-called personal sovereignty could only be called *jura in personam* against other States. The rights of the home State against its own nationals abroad are a matter not of international law but of the municipal law of the home State. So it would be more correct, I think, to speak, not of territorial and personal sovereignty, but only of territorial sovereignty, which may be restricted by obligations (foreign *jura in personam*), among which would

[1] *Cf.* Heilborn, *ubi supra*, pp. 20 ff.; Zitelmann, *Internationales Privatrecht*, i, p. 98 ff.

rank the rights of foreign States concerning their nationals in the territory of the sovereign State.

II. Permanent Sovereignty over Individuals, over Corporeal Things and Legal Relations. 1. Sovereignty over Individuals.—Textbooks on international public law speak of individuals as "subjects," "citizens," "nationals" or "Staatsangehörigen" (*ressortissants*), of a certain State; the exact legal meaning of these terms, however, is not accurately determined. Before going further, it is necessary to draw the inference from the definition of international law adopted above (p. 82), and to state that, as international law stands at present, individuals cannot have rights or duties under international law.

To say that individuals according to international law are citizens, nationals, or subjects of a certain State, or that they owe allegiance to a certain State, is obviously not quite correct. Statements of this sort may be correct in some, though not in all, systems of municipal law,[1] but they do not say anything about obligations between States which alone form international law, and such statements therefore cannot be accepted as correctly formulated rules of international law.

The following definition is an attempt to state more clearly the rules of international law as they exist at present.

An individual is a "national" of a State, in the meaning of international law, when all States are bound to recognize that he is under permanent sovereignty of this State, *i.e.* that the home State can treat him while at home at its discretion.

Permanent sovereignty over individuals, as defined, involves several primary and secondary consequences such as the right of protest against intervention, the *jus protegendi*, the so-called vicarious responsibility, and others.

So nationality of individuals, whatever it may be in municipal law, means, in international law, only a status of recognized subjection with its different consequences; it does not imply that the national owes either allegiance or enjoys rights of citizenship,[2] such matters being left to municipal law to regulate.

Permanent sovereignty is to be distinguished from the restricted sovereignty which a State exercises temporarily over aliens while within its own territory.

There is unanimity amongst writers on public international law that an individual is only a national of a State if such State has conferred its nationality upon him, either automatically, or by virtue of some legislative or administrative act. So we may state, as a recognized rule of international public law: The sovereignty of a State over an individual

[1] A person, for instance a slave, may be subject of a State and enjoy its diplomatic protection abroad without having any civic status and without owing any allegiance, which can be owed only by somebody who has the legal capacity to acquire rights and to undergo obligations.

[2] *Cf.* Oppenheim, *ubi supra*, i, p. 464, and Audinet in *Clunet*, 1923, p. 785, and, for the opposite view, Wilson, *ubi supra*, p. 131.

involves the grant to or the imposition on that individual of the nationality of that State.

There seems to be less unanimity as to whether international law contains any restrictions to the freedom of every State to impose its nationality on whomsoever it pleases.

Usually, it is said that nationality must not be imposed *in invitum*.[1] Hall (p. 57), however, takes it only for granted that the quality of citizen must not be imposed on certain persons with regard to whose position there can be no doubt, but that, where a difference of legal theory can exist, international law has made no choice, and it is left open to States to act as they like.

Ruegger (p. 30) declares as illegal not only the imposing of nationality *in invitum*, but restricts the possibility of conferring nationality to those cases where an actual and sufficient connexion is already in existence between the individual and the territory of the conferring State. Ruegger's opinion does not seem to be in accordance with the rules of international law and existing practice ; it has not infrequently happened that aliens residing in another country have been granted the nationality of a State although they have never been within its territory. There seems to be no restriction in international law on the conferring of nationality with the consent of the individual, though the old home State of the individual does not consent to the acquisition of a new nationality by its national.[2] The only question seems to be whether nationality can be imposed on nationals of other States against both their own will and the will of their home State ; and I think this question has to be answered in the negative. If nationality could be imposed at discretion, the whole system of protection of citizens abroad would be in danger. If every State were at liberty to impose nationality on any individual it likes, this would be an easy way to acquire a right to treat such individuals while they are within the territory of the imposing State without regard to *jus protegendi* of other States.

So it seems to be recognized, in international public law, that :

1. Every State is entitled to assume sovereignty over an individual

[1] *Cf.* Heilborn, *ubi supra*, p. 90 ; Ruegger, *Die Staatsangehörigkeit der juristischen Personen*. Schweizerische Vereinigung fuer Internationales Recht. Druckschrift No. 10, Zuerich 1918, pp. 25 ff.

This opinion overlooks the fact that the nationality which is conferred upon new-born children is usually imposed nationality. It seems that international law, according to an old custom, admits two systems of imposing nationality on new-born children, which are usually shortly described as the system of *jus sanguinis*, and the system of *jus soli*.

[2] There could, however, be some doubt as to whether, for instance, Peru would be entitled to naturalize with their own, but without their Government's consent, Bulgarian citizens who have never left, nor intend to leave, Bulgaria.

In the case of the absorption of an existing State, the imposing of a new nationality on its former citizens by the conquering State is, strictly speaking, compulsory naturalization of stateless persons—after the absorption there being no State left to protect the individuals concerned against such naturalization.

by the act of granting to or imposing upon him its nationality, with the consent of either the individual or the consent of the home State of the individual, or with the consent of both of them.

2. Every State may confer or impose sovereignty on a stateless individual, at any rate if the individual is living within its territory.

3. Nationality may be imposed on aliens against both their own and their home State's will, if a recognized international custom [1] has arisen which authorizes such imposition.

As pointed out above, this is the case:

(1) If the individual in question is the son of a recognized national of the imposing State, and

(2) If the individual has been born in the territory of the imposing State, at least if the imposition takes place simultaneously with or immediately after the birth, or if the laws of the imposing State provide for such imposition at the time of the birth of the individual.

2. Sovereignty over Corporeal Things.—Although hardly any textbook on international public law devotes a chapter to this question,[2] corporeal things may be under what has been described above as permanent sovereignty quite as well as individuals. In consideration of the economic importance which is attached to this question, it would seem desirable that writers on international law should undertake to elucidate it somewhat more clearly than has hitherto been done. As at present the question is still rather unsettled, the following remarks do not form an exhaustive list of existing rules, but are to be regarded rather as a preliminary attempt to formulate such rules and as material for future discussion:

1. A State may assume permanent sovereignty over:
   - (*a*) The moveable property of its nationals, while it is on its territory. So ownership, although an important element, is not the only test for the liberty of a State to assume permanent sovereignty over corporeal things.
   - (*b*) The landed property within the boundaries of the State territory, also if such property belongs to nationals of other States.

2. The property of nationals which is outside the territory of the home State is not under permanent sovereignty of the home State, subject to certain rights of protection against other States.

3. A State may assert temporary sovereignty over an alien's property within the boundaries of its territory; such sovereignty, however, would be restricted by obligations towards the home State of the alien.[3]

A State can not assume sovereignty over an alien's property which is not within its territory.

[1] *Cf.* above, note 1 to p. 84.

[2] Only the nationality of ships has been usually discussed as a special problem; *cf.* Ruegger, *ubi supra*, pp. 15, 23.

[3] *Cf.* above, pp. 82 *et seq.*

3. Sovereignty over Legal Relations.—Private rights are, in municipal systems of law and in legal commentaries, sometimes described as "things," or as *res incorporales* which may be owned or even possessed.[1] However this may be in municipal law, sovereignty over rights and other legal relations in international public law is fundamentally different from sovereignty over corporeal things.

Having a private right means nothing more than being allowed by a certain municipal law to do or not to do a certain thing. So a private right is not a thing, but a legal position in some national system of law.

Whatever the relations between two sovereign States may be, a State cannot change the law or the legal relations created by the law of another State.[2] That is a self-evident fact, which may be stated in the following two rules:

1. Every State has permanent sovereignty over the legal relations created by it; and

2. No State has permanent sovereignty over the rights and legal relations created by another State, unless the other State gives it authority to this effect.

The question, how far a State is under obligation not to interfere, or to guarantee the *exercise* of rights, created by itself or by other States, or to create rights or not to cancel granted rights, is a question which is to be distinguished from the question treated in this paragraph which deals with sovereignty (*jus in re*) and not with obligations concerning the exercise of such sovereignty (*jura in personam*).

Permanent Sovereignty over Corporations.—Fauchille and Oppenheim[3] are of the opinion that the nationality of corporations is entirely, or mainly, a matter of international private law. But it is difficult to see where else but in a treatise on international public law the question could be decided, whether States can assume sovereignty and exercise a *jus protegendi* over what is called a corporation.

Other writers do not deny that the question of nationality of corporations arises in international law, but they deny that corporations have a nationality.[4]

[1] *Cf.* my criticism of the whole conception of incorporeal things and objects in *Völkerrechtspolitik als Wissenschaft*, 1922, pp. 59 ff.

[2] If State A grants to individual X a licence, State B may attempt to "confiscate" the licence, but such an attempt could only have the effect of actually preventing X from using his licence within the territory of B; the municipal law of B cannot possibly alter the fact that X is allowed by the municipal law of A to make use of his licence.

[3] P. 973, vol. i, p. 463.

[4] V. Bahr, Lehrbuch, *ubi supra*, p. 53: "Von Staatsangehörigkeit im eigentlichen Sinne besser nicht zu reden." Zitelmann, *ubi supra*, vol. ii, p. 111, seems doubtful, but leaves the question open. The Argentine note to the British Government in the La Banque de Londres et du Rio de la Plata incident, reported by Zeballos in *Clunet*, 1906, pp. 604 ff.: "Les personnes juridiques . . . doivent existence à la loi du pays qui les autorise et par conséquent elles sont ni nationales, ni étrangères." Baty and Morgan, *War, its Conduct and Legal Results*, p. 256: "English law may manu-

Again, others assert that corporations can stand in a lasting relation to a certain State, but they refuse to admit that such relation, though it might be similar to nationality, is anything that could be rightly called nationality.[1]

The majority of writers and judges seem to hold that a corporation being, at least according to their opinion, a juristic person, can have a nationality, and that the nationality of a corporation, although the details of both kinds of nationality may differ from each other, is the nationality of a person as well as the nationality of an individual. Apparently, this opinion underlies the discussions of most writers who try to fix a certain criterion for the determination of the question: the nationality of *which* State a corporation possesses or ought to possess. But we find the opinion also laid down expressly that a corporation is capable of having a nationality.[2]

As sovereignty always exists only in so far as it has been conferred or imposed by a State, so also sovereignty over corporations can exist only if and in so far as it has been conferred or imposed by a State. This is a preliminary statement which is almost self-evident. It is, however, the only possible but often overlooked starting-point for any attempt to solve the problem of nationality of corporations in international public law. The practical difficulty is that, apparently, many States have not yet defined what corporations they consider as their nationals and

facture a conception, but . . . does not necessarily mean to invest it with any national virtue." *Clunet*, 1916, p. 495: "Si l'on revient avec vrais principes, la question de la nationalité des sociétés ne se pose même pas." "Des étrangers ne peuvent former entre eux qu'une société étrangère." Lord Parker (in the Daimler case) pointed out that one could speak of nationality of corporations only by a figure of speech. Martin Achard, *La Nationalité des Sociétés anonymes*, Société Suisse de Droit International. Publication Nr. 11. Zuerich, 1918, p. 43: "les sociétés de commerce n'ont pas de nationalité proprement dite; les expressions 'société suisse' . . . ne signifient nullement . . . nationalité."

[1] Mamelock, *Die Staatsangehörigkeit der juristischen Personen*, Schweizerische Vereinigung fuer Internationale Recht. Druckschrift Nr. 9, p. 59. Juristische Personen haben keine echte Staatsangehörigkeit, wohl aber ist die Eigenschaft einer juristischen Person als einer inländischen dem Verhältnis der Staatsangehörigkeit einer physischen Person analog." Decision of the Tribunal Mixte Franco-Allemand in *Société anonyme du charbonnage Frédéric Henri* c. *État allemand*, *Clunet*, 1923, p. 603: "Pas de nationalité proprement dite."

[2] For instance, *Watkins* v. *Scottish Imperial Co.* [1889] 23 Q.B. 285. Held that a Scottish company cannot be sued in England, because Scotsmen cannot be sued in England. Lord Macnaghten, in *Janson* v. *Driefontein Consolidated Mines* [1902] A.C. 497: "The corporation was, to all intents and purposes, in the position of a natural-born subject of the late South African Republic." Lord Parmoor, in Daimler case, p. 348, stated that a company had a nationality of its own. Lyon Caen in *Clunet*, 1917, p. 5: "Les sociétés comme les individus ont une nationalité." *Cf.* also Caselli, "Contributions à l'étude du problème de la nationalité des sociétés de commerce," in *Clunet*, 1921, p. 824. Loeb in *Clunet*, 1922, p. 311, points out that corporations have a nationality, though they are not citizens. Especially in America, the term "domestic corporation" is customary; *cf.* Loeb in *Clunet*, 1910, p. 96, and others.

in what respects they consider them so, while many countries have left it to general jurisprudence and to international law to settle this question of the nationality of corporations which they alone are able to settle.[1] Whether certain municipal acts and laws [2] involve municipal assumption of sovereignty over corporations is a question of interpretation of municipal law, not of international law. The first question thus is whether nationality has been conferred or imposed by a State.

The second question is, whether a State which confers or imposes nationality upon (*i.e.* assumes sovereignty over) what is called a corporation really assumes sovereignty over something which could be correctly called a person and as such be compared to individuals. The theories which give a positive answer to this question usually say that a " juristic person " is in so many respects like a " natural " person that it ought to be considered and treated as a person in all or many respects.

This opinion, which tries to solve the problem by analogies between " natural " and " artificial " persons, seems to mistake the facts. Such an analogy is based either on the assertion that a corporation is a living body, or on the assertion that a corporation is a fictitious person. The first assertion is rather a poetic way of comparing one thing to another by a figure of speech than a scientific analysis of facts. Besides, even if this assertion were right, there would be no conclusive logical reason why the rules of international public law concerning the nationality of those living bodies which are called individuals should be, *ipso facto*, applicable to those totally different living bodies which corporations are said to form. As to the second assertion, it may or may not be that a corporation, although not a living person, is treated like or considered as a person by some systems of municipal law; but—and this seems to be generally admitted—a system of law can make a corporation a living person no more than it can make any other dead thing alive. If some systems of municipal law really treat corporations like living persons, although corporations are not living persons, there is no reason, at least no conclusive one, why international public law should do the same. Besides, as is pointed out later in the annex, a corporation is better considered neither as an " artificial " or a " natural " person, nor as a mere partnership, but as a " legal entity of rights and legal capacities which are impressed with a special character derived from the objects of the corporation." Consequently, we may safely say that if a State confers or imposes nationality upon what is called a corporation, this nationality, as far as international law is concerned, is not to be regarded as the nationality of a person, because, as has been pointed out, a corporation is neither a real person nor has international public law evolved so far any rule of law according to which a corporation, by way of fiction, has to be

[1] *Cf.* Marcel-Edouard Cuq, *La Nationalité des sociétés*, 1921, p. 33: "Cette abstention du législateur, qui dure encore aujourd'hui, est regrettable."

[2] For instance, a paragraph of a commercial code, which says that corporations of a certain character shall be considered as nationals.

considered and treated as a so-called " natural " person. On the other hand, there is no reason why a State should not be able to assume sovereignty over what forms a corporation, namely:

1. The individuals forming the corporation.
2. The whole of:

(*a*) The official work of these individuals for the object of the corporation,

(*b*) The land and chattels which form the corporate property,

(*c*) The corporate rights and other legal relations.

If one speaks briefly of the nationality of a corporation it ought always to be stated clearly which is meant, namely, the individuals forming the corporation, or the corporate tangible property, or the entity of corporate legal relations and activities of which these individuals are the subjects.

A corporation, or more correctly the elements of a corporation in the just defined sense, over which no sovereignty has been assumed by any municipal law, are under no permanent sovereignty at all (*i.e.* stateless).

As the individuals which " form " the corporation are sometimes called the corporation, the statement seems to be necessary that no nationality (permanent sovereignty) can be imposed upon individuals except with their consent or that of their home State merely because such individuals are members of a corporation which is under the permanent sovereignty of a foreign State.

As to legal relations, it was stated that they are under the permanent sovereignty of the State which created them. This rule is fully applicable to corporations. The legal relations of a corporation may be divided into two kinds:

(*a*) The legal relations without which the corporation would not exist as such, or at least only as a so-called *de facto* corporation and which are usually fixed in the statutes of the corporation or in laws supplementing or regulating such statutes, and

(*b*) Other legal relations.

The first kind of legal relations, of course, are more important for the corporation in so far as they concern its very existence, and this might be said to justify the statement of Schuster: " The status of a corporation is determined by the place of its creation."

As above stated, a State is not always allowed to withdraw rights granted by itself, and is sometimes under obligation to grant certain rights, namely, when the subject of such rights is an alien under foreign protection. The question arises: " When are corporate rights the rights of an alien? "

So there are two difficulties left which are both of the same character, namely:

(1) Whose property is corporate tangible property, and as a national of which State ought its owner to be considered?

(2) When are corporate rights the rights of an alien?

Of course, the first difficulty would not arise if international public law had already evolved any special rule concerning the assumption of sovereignty of corporate chattels. As, however, this is not yet the case, we have to see whether the general rules concerning assumption of sovereignty over chattels and for which the nationality of the owner is a decisive factor, can be applied to corporate chattels.

The first and apparently the most simple suggestion would be that corporate property, as far as its nationality is concerned, ought to be considered and treated as or like the private property of the individuals who form the corporation. The possible objections to the treating of corporate property in this question simply as or like the private property of the members of the corporation are of a twofold character :

1. " Corporate property " is usually not the property of a *certa persona.*

2. Corporate property is " not the private property of the members."

The first objection has been more frequently discussed than the second one, and its different discussions mainly concern three points :

(*a*) The members of a corporation may belong to different nations.

(*b*) The present members of a corporation often cannot be ascertained.

(*c*) At any time present members may cease to be members and new ones take their place.

The difficulty under (*a*) can arise wherever there is a co-ownership of property belonging to individuals of several nationalities ; it can be solved by saying that a certain share in the property has this and another share another national character. Where ordinary co-ownership is to to be dealt with there is not even the possibility of avoiding the difficulties of determining the national character by ascribing the property to one artificial person of a certain national character. That the same object is under double or divided sovereignty also takes place in the case where it is situated in a territory under the exclusive sovereignty of two States which have a condominium over it. The difficulty under (*b*) does not always arise, for instance, usually not in the case of corporations founded by the members of one family to carry on business, corporations consisting of only a few shareholders (and of course not in cases of corporations the members or shareholders of which are registered) ; and in similar cases, and there is no reason why the alleged fact that in many cases the members are not to be ascertained should be of any relevance in cases where the members can be ascertained. Besides, even in big and international joint stock companies the nationality of the shareholders is not quite so unknown as the name " société anonyme " might suggest. If the shareholders are registered, there is no difficulty at all ; if not, the claims for the payment of coupons and the annual meetings give more or less certain indications.

But in no case would the mere fact that the owners cannot be ascertained, upon whose nationality the nationality of the property would depend, have the consequence that such property has no national

character, or has to be given a national character different from the character of its owners.

As to the difficulty under (*c*) it seems to me that the fact that corporate property is bound to change the owner and may be to-day "French" and to-morrow "English" capital is no more an argument against considering it as having the national character of the corporation members than the fact that individual private property may change its national character by *successio generalis* in case of death is an argument against the recognition of the national character of individual private property.

If the whole difference between corporate and private property would be, that corporate property is the property of an *incerta persona* while private property usually is the property of a *certa persona*, the whole difference would be only a difference of the degree of uncertainty, and there would be no reason why corporate property should not be able to share the national character of its "owners" quite as well as private property.

What really distinguishes corporate property from private property, as far as recognition of permanent sovereignty is concerned, is the circumstance that corporate property is neither the private property of the members nor the private property of anybody else. Nearly all existing discussions commit the mistake of discussing only the following possibilities:

(*a*) No man's property; (*b*) private property of several natural persons; (*c*) private property of distinct juristic persons.

(*a*) Corporate property is not "no man's property"; neither is it a possible object of an *occupatio*, nor can it be said that there is nobody to dispose of or to enjoy corporate property.

(*b*) There is no doubt that corporate property forms a distinct legal entity, but the fact that some systems of municipal law treat such property as the property of a distinct person is no reason why international law should do the same (*cf.* above, p. 88).

(*c*) So we come, *per exclusionem*, to the result that corporate property must be the property of the corporation members for the time being (*cf.* the annex).[1]

Unfortunately—and this has been usually overlooked by the so-called partnership theories of corporation—this result does not justify, *ipso facto*, the treatment of corporate property as or like the *private* property of the members. It is only after the preliminary statement under (*c*) that the really difficult question arises: Has property of several individuals, which is their corporate property for the duration of their membership in the corporation, the same national character as private property of

[1] It may be added that corporate property cannot be considered as the private property of anybody outside the corporation and its members. Corporate property is neither the private property of the State, or another legislator, under whose law the corporation was founded, nor the private property of the so-called "destinataires," *i.e.* those persons for whose advantage the corporation was founded.

the same individual? Or, as nationality always has to be conferred or imposed, are there no more restrictions to the conferring or imposing of nationality, *i.e.* permanent sovereignty to or upon corporate property of individuals, than there are in the case of private property of individuals?

This question is altogether different from the customary question, *whose* property corporate property is, and, I think, must be answered in the negative.

If we take the example of a pious foundation which has been founded and is managed by Italians, but which is a juristic person under Swiss law and managed in Switzerland, it is quite true that those persons who can dispose of the property are Italians, but, on the other hand, two things are quite clear, namely, that they cannot dispose freely of the corporate property, but that they can exercise their corporate rights only for the object which they are destined in the corporate statute and this statute has been created by, and its existence and content depend upon Swiss law. Or, expressing the matter more briefly, the corporate property is impressed with a "destination," and any use of the corporate rights is *ultra vires*, which is not considered by law as "a lawful use of the corporate rights for their destined object."

The second thing, which is clear, is this, that law has made the corporate rights and other legal relations a separate legal entity, the main features of such entity, besides the destination, usually being that:

(*a*) By certain acts new rights may be acquired and new obligations undergone, which enter into the separate legal entity (creation of a distinct "legal capacity").

(*b*) That a member of the corporation would commit a crime if, without authorization, he were to transfer rights from the corporate legal entity to the legal entity of its private rights.

(*c*) That acts which are intended to alter the rights and obligations of the corporate entity have to be done under a special form, "in the name of the corporation."

(*d*) That for most obligations, which belong to the corporate entity, the members are not responsible.

(*e*) That it is the property of the members only for the time of their membership.

In case of a trading corporation, the legal situation is the same, the only differences—which for our question are of no relevance—being that:

(*a*) The corporate object coincides to some extent with the personal interests of the members, although it is neither actually nor legally identical with them; and

(*b*) The members of the corporation may have power to alter certain parts of the constitution of the corporation, although the constitution of the corporation is, during its validity, quite as much above the members as a statute of England is above the members of Parliament.

In consideration of all these facts, it would not be wrong to say that corporate property—if we use the word "belong" not in a strict legal

sense—" belongs " to the destined object of the corporation, and that it is, although certainly nobody else's property, the corporate and not the private property of the members.

Therefore it is impossible to say, I think, that the rules which apply to the assumption of sovereignty over private chattels are, *ipso facto*, applicable to corporate property.

On the other hand, it cannot be argued by analogy that, because private property belonging to individuals shares the national character of the individual, property which " belongs " to destined objects must share the national character of the object.

Firstly, property does not belong to destined objects in the same sense that it belongs to individuals; and, secondly, while one can speak of a nationality of corporate property, and, in a particular sense, of the nationality of the statute which fixes the destined object, one cannot possibly speak of a permanent sovereignty over a destined object which would involve permanent sovereignty over the property belonging to such destined objects.[1]

The followers of the fiction theory consider a corporation as a distinct person, and they have always drawn the conclusion that corporate rights are rights of a distinct person; but they have never gone so far as to say that in the light of international law corporate activities are to be considered not simply as the activities of individuals but as activities of a distinct person. For instance, it has never been argued that a national of a neutral State who is a manager of a corporation which is under the sovereignty of a belligerent State is therefore entitled to commit acts

[1] If one tries to solve the question by saying that corporate capital has the national character of the object for which it is destined, the objection to such solution is not only that international law contains no such rule, but another difficulty is that, while certainly corporate property is not the private property of the members, but property which is destined to a certain fixed end, it often, and especially in the case of trading corporations, happens that the fixed end coincides to a great extent with the private interests of the members, while, on the other side, the State under whose law the corporate object was fixed is hardly interested in the work for the object. So, in such cases, the corporate object may be fixed by the Government, but it may contain the interests of mainly foreigners, so that one cannot say whether the object has a national or a foreign character; such difficulties cannot be solved by interpretation, but only by convention or custom.

It would, of course, be possible to draft rules which could be asserted to be commandments of law because they are alleged to be commandments of justice and reason; but:

1. Commandments of justice and reason are not, *ipso facto*, international law.

2. The assertion that drafted rules of justice are part of the *lex lata* leads usually to the result that several systems arise which are described by their inventors and adherers as positive law. The probable consequences of such a situation are:

(*a*) Uncertainty about the *lex lata*;

(*b*) Disputes between States, which adopt different interpretations;

(*c*) Unproductive discussions between international lawyers; and

(*d*) Unnecessary delay of the possible legislative solution of the problem, because the authorities on international law state that the question is already settled by law, and only a question of interpretation.

which would be unlawful for a neutral subject; it has always been undisputed—or rather, it has never been denied—that corporate activities of an individual have no special status in international law.

The rule of international public law which authorizes assumption of permitting sovereignty over private chattels legalizes an assumption of sovereignty over property of which a national of the assuming State is the owner, or, if we analyse ownership into its essential elements, of which the national of the assuming State is entitled to dispose of and which he is entitled to control and enjoy in as far as such rights are not temporarily restricted by servitudes. Consequently, this rule of international law would be applicable in analogy without any difficulty to such corporate property which is exclusively at the disposal of and in the control and enjoyment of nationals of the assuming State, and which is within the territory of the assuming State. But this rule of international law would not be applicable, I think, to corporate property which does not fulfil these conditions. To this second category, corporate property would belong—

(*a*) If some of its members or managers are aliens.

(*b*) If the " destination " is fixed by foreign law, *i.e.* if the corporation has been created under foreign law. In this case, it depends upon the law and legislation of another State under which conditions the use of the corporate property is *ultra vires*. As far as this second category of corporate property is concerned, it has therefore to be stated that—

1. The rules governing the nationality of private chattels are not applicable in analogy, and

2. No special rule concerning their nationality has grown up in international public law,

and that consequently,

1. No rule of international law exists which authorizes assumption of permanent sovereignty over corporate property except if such corporate property is entirely in the control and enjoyment of nationals of the assuming State, and if besides the corporation has been founded under the law of the assuming State, and—

2. No rule of international law exists which authorizes the assumption of a *jus protegendi* over corporate rights, except under the same conditions.

Of course, this would not prevent foreign States from recognizing assumption of sovereignty over corporate chattels and rights, also in cases where, according to the aforesaid, no legal necessity would exist for such recognition.

So we may sum up the present legal situation as follows :

1. A State is not entitled to assume permanent sovereignty over an individual merely because such an individual is a member of or otherwise connected with a corporation.

2. A State may assume permanent sovereignty over corporate land which is situated within its territory.

3. A State is entitled to assume permanent sovereignty over corporate

chattels only if the corporation has been founded under its laws and if control and enjoyment of such corporate property are exclusively in the hands of its nationals.

4. A State has permanent sovereignty in the above defined meaning over corporate rights and other corporate legal relations which it has created itself.

5. A State may assume a *jus protegendi* over corporate rights as the rights of nationals only under the conditions laid down under 3.

6. Corporate activities enjoy no particular status in international law.

7. Foreign States may recognize the assumption of permanent sovereignty over corporate property rights and other legal relations, if they are under no obligation to do so.

A number of judges and writers hold that a corporation has, *ipso facto*, the nationality or is a subject of that State under whose law or by whom the corporation was created. Although the adoption of this doctrine is not entirely restricted to discussions concerning municipal law, it is not clear whether this doctrine has ever been established as a doctrine of international law.[1] In other words, it is doubtful whether this doctrine has been described as the only one the adoption of which by a State would be lawful according to international law.

Closely related to this doctrine is another doctrine, according to which, if a corporation had to acquire the authorization of a Government for its work and foundation it acquires, *ipso facto*, the nationality of the granting Government with such authorization.[2]

[1] Mamelock, *ubi supra*, p. 16, quotes this theory, of which he himself does not approve, as a theory of international public law. *Cf.* also Cuq, *ubi supra*, p. 34, report of the opinion of Thaller, *Annales de droit commerciales*, 1890, p. 260.

[2] The following judges and writers try to solve special problems by the general statement that a corporation has the nationality of the State under whose law it was founded. Calvo, *ubi supra*, s. 737. *Attorney-General* v. *The Jewish Colonization Association* [1901] 1 Q.B. 130 (English case of taxation); Rivas, report of the law of Venezuela in *Clunet*, 1905, p. 520; decision of the Cour d'Appel de Rio de Janeiro in *Zeizing* v. *Walter & Co.*, *Clunet*, 1919, p. 810 (question whether a creditor was to be considered as a neutral or as a belligerent subject); French Cour de Cassation in a decision against a tenant, *Clunet*, 1920, p. 591; Tribunal de Milano in a decision concerning competence of jurisdiction, *Clunet*, 1923, p. 1020, although this decision considers as decisive rather the place than the law of creation; Moore, *Digest*, *ubi supra*, iii, p. 801, reports of American cases and decisions; Schuster, *ubi supra*, p. 64; *British Year-book*, 1922–1923, p. 186; Weiss, *Traité de droit international privé*, 8th ed., p. 311, in a discussion of questions of international private law only; Westlake, *Private International Law*, 6th ed., p. 367, clearly does not want to establish a general doctrine of international public law; Howard Thayer Kingsbury, according to a review of Loeb, in *American Journal*, 1923, p. 408, determines nationality by the place of incorporation, which, according to Loeb, has the great merit of certainty; E. R. Salem in *Clunet*, 1914, p. 45: "Effets de l'annexion sur la nationalité des sociétés anonymes ottomanes." "Dans les pays où la société a besoin pour se constituer d'une autorisation administrative elle a la nationalité dans le pays qui en lui donnant existence lui confère, *ipso facto*, sa nationalité."

According to the most frequently adopted doctrine a corporation has the nationality of the country within the territory of which its actual administrative centre is. This doctrine has been put forward as a rule of international law at least by some of the writers on the subject.[1]

According to the " control theory," a corporation has the nationality of the members which control it. The assertion, however, that this theory is dominant since the war seems to be based on a confusion between the control theory for the purpose of deciding enemy character and between the control theory for the purpose of deciding nationality ; the two theories are not identical, because enemy character and nationality are not identical conceptions.

While there is no doubt that the control theory has been very frequently adopted for the question of enemy character, there are but few examples where this theory has been clearly put forward as a theory of international law on the nationality of corporations.[2]

The following theories seem to have been evolved only by the science of the conflict of municipal laws :

1. A corporation has the nationality of the country within the territory of which is its " établissement principal."[3]

2. A corporation has the nationality of the country within the territory of which is its centre of exploitation.[4]

3. A corporation has the nationality of its founders.[4]

[1] Ernst Isay, *Die Staatsangehörigkeit der juristischen Personen* ; Liszt, *ubi supra*, p. 99 ; Neumeyer, *Die Staatsangehörigkeit der juristischen Personen und das Gemischte Deutsch-Französische Schiedsgericht*, *Zeitschrift für Völkerrecht*, p. 3 ; Ruegger, *ubi supra*, p. 45 ; Cuq, *ubi supra*, pp. 53 *et seq.* Doubts as to whether a doctrine of international public law is pronounced may exist in the following decisions, laws and essays, some of which clearly only concern a certain system of municipal law : *De Beer Consolidated Mines Case* [1906] A.C. 455 ; English case of taxation, and similar cases for instance : the San Paolo Railway Co., Case [1896] A.C. 31 ; Portuguese commercial code, art. 110 ; Italian code, art. 230, both according to the report of Schuster, *ubi supra* ; Martin Achard, p. 14, report of Swiss and other Legislatures ; the decision of a Belgian Court, Neumeyer's *Zeitschrift*, Bd. 31 (1924), p. 302 ; decision of an Italian Court in *Società Gaetamo Marzotto* v. *Società Italiana Meister*, Niemeyer's *Zeitschrift*, Bd. 31, pp. 302–3 ; Cour d'Appel de Rouen in the Campanhia Krische Case, *Clunet*, 1916, p. 990 ; Lyon Caen in *Clunet*, 1917, p. 6 ; Paul Pic, " Contributions à l'étude de la nationalité des sociétés," *Clunet*, 1917, p. 841 ; Mario d'Amelio, on Italian legislation in *Clunet*, 1917, p. 1224 ; Mamelock *ubi supra*, p. 59, mainly on Swiss legislation ; Arminjon, *Étrangers et protégés dans l'Empire Ottoman*, Tome I, p. 186, mainly on Turkish legislation ; Asser et Rivier, *Éléments de droit international privé*, p. 202, on questions of international private law.

[2] *Cf.* Barrault, in *Clunet*, 1923, p. 237 ; Tribunal Mixte Franco-Allemand in the quoted decision reported in *Clunet*, 1923, p. 600 ; Fauchille, *ubi supra*, p. 973. Against this theory : Schuster, *ubi supra*, p. 64 ; Ruegger, *ubi supra*, p. 50 ; Neumeyer, *ubi supra*, s. 3, who points out with particular clearness that this theory is to be distinguished from the control theory in questions of enemy character.

[3] Art. 129 de la loi belge du 18 Mai, 1873.

[4] See Mamelock, *ubi supra*, p. 16.

In one case, or, at any rate, only in a few cases, States or writers have adopted the following two theories :

1. A corporation may acquire nationality for special purposes, for instance, if a corporation enters into a contract with a foreign Government it is a subject of this Government in all questions where the contract is concerned.[1]

2. A corporation has the nationality of the State to the political economy of which it belongs.[2]

All these theories can claim validity only with the restriction that sovereignty has to be assumed by the municipal law or by some other act of the conferring State and that nobody simply is a national of a State.

The supporters of none of these theories have been able to prove that their opinion represents the actual situation of international law. It may well be that one or the other of these theories is more reasonable, more logical or more practical than the other, but this does not make its contents a rule of international law. Which of these theories has more to recommend it with a view of future legislation will have to be examined in the conclusion of this article.

The " place of incorporation " theory is either based on arguments of a not strictly legal character, or on the argument that the place of creation of an artificial person corresponds to the birthplace of a natural person. But, firstly, the birthplace is not the necessary determining criterion for the nationality of an individual; and, secondly, it is erroneous to compare the creation of legal relations and situations with the birth of living persons.

The same mistake occurs, if the " centre of administration " theory is based upon an analogy between the domicile of an individual and the domicile of a juristic person. As, for instance, Schuster has rightly pointed out, domicile has never anything to do with nationality, and besides, the domicile of an individual is the place where the individual constantly is, while the " domicile " of a corporation is the place where a certain work is done or ought to be done according to the statute of the corporation.

If the " control theory " says that corporate rights are, for questions of public law, nothing more than the joint rights of partners, the only objection to such statement would be that which has been pointed out above (pp. 90–1), namely, that such an opinion fails to see the peculiar character of the corporate rights and their " destination." But sometimes the " control theory " is based on the following argument : it is not contested that a corporation is a person of some kind, but it is said that the character

[1] Incident of the North and South American Construction Company ; attitude of the Chilian Government ; Moore, *History and Digest of the Arbitration of which the United States was a Party*, iii, p. 2318.

[2] Caselli, in *Clunet*, 1921, p, 829. *Cf.* also the report of the different nationality theories in Cuq, *ubi supra*, pp. 19 *et seq.*

of such a person is to be determined in each case, and that it is " coloured " by the national character of its controlling members. This argument, however, seems to contain the double mistake of considering a corporation as a person with a " character," and, in doing so, of determining this character in a most arbitrary way. There is no reason why, for questions of nationality, the nationality of the controlling members should be any more decisive than, for instance, the place of creation or the centre of administration. The control theory in this second form is a half-way theory ; either it ought to do away with the conception of a corporation as a distinct person or, if it considers it as a distinct person, it ought to admit that such a person must always have a national character of its own.

The doctrines described above, on p. 96, do not seem to deserve any serious consideration, as far as problems of international law are concerned, and the same may safely be said of the doctrine which the Chilian Government has adopted only on one occasion and without success.

The doctrine of Caselli cannot, and has not, been proved to be a doctrine of international law as now recognized ; so far as it is intended to be a draft for future legislation, the extreme vagueness of its criterion seems to be a serious disadvantage.

Neumeyer says :

> Es hat von jeher als Ausfluss der Souveränität gegolten, dass ein Staat innerhalb normaler Anknüpfungspunkte selbst bestimmt, wenn er als seinen Angehörigen betrachten will. . . . Diese Gründe treffen auch auf juristische Personen zu.

Neumeyer's argument seems to be open to two objections :

1. Analogies between " natural " and " juristic " persons cannot be conclusive.

2. The nationality of individuals is determined by somewhat more definite rules than those which Neumeyer describes as rules of international law on nationality.

So far as the practical side is concerned, the theory of Neumeyer seems to leave too much room for dispute as to what in every single case is to be considered as a " normal " and what as an " abnormal " connecting link (Anknüpfungspunkt).

But, apart from these objections, the theory of Neumeyer is certainly far more precise in its formulation of the problems which are particular to international law than most of the other theories, which usually are nothing more than theories which have been transferred to international law from discussions on the conflict of municipal laws and municipal legislation concerning enemy character.

The application to corporations of the nationality theory of Hall would lead to the rule that a State can confer or impose nationality on corporate property and activities as a whole only when all theories agree that the State is entitled to do so. This rule, of course, cannot be said to be a rule of law ; it is only a more or less ingenious device to determine what in an obscure legal situation may safely be allowed without the

risk of any dispute; its practical results, however, are nearly the same as those to which we have referred above, on pp. 94–5.

Double nationality is a recognized institution of international law, and there is no reason why there could be no double permanent sovereignty over a corporation and its property.

Ruegger [1] is of the opposite opinion, because, as he points out, the effective territorial connexion of a corporation, by which, according to him, the nationality of a corporation is determined, can only be a connexion with *one* territory. But, even if territorial connexion were the test of nationality, it is difficult to see why a corporation can be effectively connected only with one territory.[2]

As international law always permits a change of nationality, or, more correctly speaking, an acquisition of new nationality, which may or may not be accompanied by a loss of old nationality, corporate activities and property also should be capable of changing the permanent sovereignty under which they are.

This seems to have been usually admitted, especially in case of annexation.[3] The opposite view, however, has not been without supporters either.[4]

Primary Consequences of Permanent Sovereignty over Corporations.—In so far as permanent sovereignty over corporations or over the elements which form a corporation exists a State can—

(*a*) Treat the objects of its sovereignty as it pleases while they are within its territory;

(*b*) According to the principles of non-interference, protest against the attempt of any other State to prevent it from doing so.

(*c*) Exercise its right of self-defence against unlawful interference or against the attempt of another State to do sovereign acts within its territory with regard to such corporations.

[1] *Ubi supra*, p. 41.

[2] With which territory is, for instance, a corporation exclusively and effectively connected the controlling members of which are half Swiss and half Italian, the registration of which has taken place in Turkey, the management of which is in the hands of an individual living in Vienna, who, however, acts always under written instructions given by the controlling members and the annual meeting of which takes place every year in a different country?

[3] *Cf.* Salem in *Clunet*, 1914, p. 46 (ceded Turkish territory), and *Clunet*, 1919, p. 1035 (ceded German Alsatian territory). Cuq, *ubi supra*, p. 181 (ceded German territory in the Congo, Austrian territory ceded under the Treaty of St. Germain).

[4] *Cf. Clunet*, 1922, p. 345, and the report of Salem, pp. 50 *et seq.* Pépy, *De la nationalité des sociétés de commerce*, p. 78. Schuster, *ubi supra*, p. 79, points out that a corporation cannot change its nationality; but within his essay this opinion has a different and perfectly justified meaning; Schuster calls nationality what has been de cribed as the "status" of a corporation, and, as this status is a position in a certain system of municipal law, it is perfectly true that this position cannot be changed by another State. The cases which have been recently decided in different countries and which deal with the status and the property of nationalized Russian corporations and of their foreign branches, decide only questions of international private law and not the nationality of the foreign branches after the nationalization of the mother-corporation.

Secondary Consequences of Permanent Sovereignty over Corporations.—I. *Jus Protegendi.*—A State which has permanent sovereignty over an individual has also the *jus protegendi* over this individual while the individual is abroad. There is comparatively little literature on the *jus protegendi* over corporations and precedents throwing any light on the question are not numerous, although the list in the note below is certainly not complete. It is submitted, however, that the existing precedents have not yet established any fixed rule of law.[1] Of more recent writers, Ruegger[2] states expressly that the *jus protegendi* is given over every corporation which is a national of a certain State. As, according to our theory, permanent sovereignty over corporations is not sovereignty over a person, we must word the rule somewhat differently : "A State has the *jus protegendi* over corporate activities, enjoyment of rights and property, if it has the recognized permanent sovereignty over such corporate rights and activities."

As, in many cases, the municipal law of the different States does not confer clearly a nationality on corporations (above, pp. 87–8), and as, further, the nationality conferred by a State on corporations is in many, if not in most cases, not recognized by the Law of Nations, it must be granted that a very great part of existing corporate interests, especially the interests of so-called international companies, are under no *jus protegendi* at all, except against such foreign States which have recognized the *jus protegendi*.

As cases where corporations have been granted permanent protection of a State without being declared its nationals are unlikely,and as corporate property is not protected as, or like the private property of the members (*cf.* above, pp. 90–1), the result is that all corporate property, which

[1] (*a*) The English Argentine incident, *Clunet*, 1906, p. 605, in which the Argentine Government took the view that no *jus protegendi* was possible over a corporation, because corporations could not have any nationality (*Cf.* Cuq, *ubi supra*, p. 95).

(*b*) A British American incident (*cf.* also Cuq, *ubi supra*, p. 95), Moore, *Digest*, *ubi supra*, iii, p. 803. The United States was requested to intervene in favour of a British corporation all the shares of which were in American hands, and which was alleged to have been injured by Great Britain. The United States refused to intervene, because, according to their opinion, there was a distinction between a corporation and its shareholders, and because Great Britain, when she created the corporation, could have forbidden the transfer of shares to foreigners altogether.

(*c*) The Antioquia incident (1865) : protection refused by the United States for a company incorporated in Columbia, but founded by American citizens (Cuq, p. 95).

(*d*) The Vacuum Oil Co. incident (1910) ; recognition of American protection refused by Austria over a company, incorporated in Hungary, but founded by American citizens (Cuq, p. 96).

(*e*) The Limanowa incident ; French protection over Austrian company, with French capital not recognized by Austria (Cuq, p. 96). *Cf.* also the Canevaro arbitration (Cuq, *ibid*).

[2] *Ubi supra*, p. 17 ; similarly, Neumeyer, *ubi supra*, s. 3 ; both hold that a State has a *jus protegendi* over corporations which are its nationals, which, according to their view (*cf.* above, p. 96), are only corporations which have their administrative centre in the protecting State.

does not fulfil the conditions stated above, pp. 94–5, is without any generally recognized protection.

As the nationality of corporations is very often not at all clear, it may easily happen that a State confers nationality and *jus protegendi* on a corporation only after an occasion has arisen on which the corporation has been injured abroad. It seems, however, to be clear that the *jus protegendi* can only be exercised for violations which took place while the *jus protegendi* was in existence; violations which take place before such date do not violate any recognized rights of the State which later on grants the *jus protegendi*.

Foelix[1] is of opinion that a trading corporation has the same rights abroad as at home. But this opinion does not seem to be perfectly correct, even in the sphere of international private law, and it is certainly incorrect if put forward as a theory of international public law.[2]

As far as the treatment of foreign corporations is concerned, one usually distinguishes between the functional and the civic capacities of a corporation.[3]

The Courts of a country may judge legal relations either in applying the law of their own country or in applying the law of another country, or they may only state that the legal relations in question are not within their jurisdiction at all.

A great part of the literature which is devoted to the problem of foreign corporations tries to lay down rules to determine the cases in which the jurisdiction of the Courts of a particular State is to be exercised, and the law which has to be applied. It is, however, clear that this problem has nothing to do with the problem of nationality or of the recognition of sovereignty; a State may have sovereignty over a person, and nevertheless authorize its Courts to consider certain legal relations of these persons as outside their jurisdiction or may authorize them to judge certain legal relations of its nationals according to foreign law; and a State may have no sovereignty over an individual and nevertheless authorize its Courts to consider certain legal relations of such individual as within their jurisdiction or as subject to the law of the country.

In spite of these clear facts, many of the theories which call themselves theories on the nationality of corporations are really nothing more than attempts to define the realm of a certain system of municipal law. Sometimes this is tried by domicile theories, the domicile of a corporation being considered as conclusive for the system of law which is to be applied.[4]

The following two aspects of these municipal problems are the only ones which are relevant to international law:

[1] *Traité de droit international privé.* Tome I, 4th Ed., 1866, p. 65.

[2] A good report of the relevant municipal pre-war laws, Pépy, *ubi supra*, pp. 38–48.

[3] Young, *ubi supra*, p. 46; Borchard, *ubi supra*, p. 41.

[4] *Cf.* Dicey, *Digest of the Law of England with reference to the Conflict of Laws*, 3rd ed., p. 163; Foote, *Private International Jurisprudence*, 3rd ed., p. 131; v. Bar, *ubi supra*; Schuster, *ubi supra*, p. 68.

1. Is a State under obligation according to international law to apply the law of certain foreign countries in certain cases ?

2. Is a State under obligation according to international law to execute the judgments of foreign law courts, and, if so, is this obligation restricted to judgments which are given within certain boundaries alleged to be fixed by international law ?

While, I think, most writers answer both questions in the negative, Zitelmann seems to be of a different opinion[1]; but even he does not say that the rules which he establishes form part of the recognized international law, and besides, he does not say that acts of jurisdiction beyond the limits which he fixes are international delinquencies; but he is of the opinion, merely, that such judgments cannot claim any recognition abroad. Now there is in international law no rule which obliges States to recognize the judgments of other States, although there are numerous treaties which stipulate such an obligation. So Zitelmann's arguments would show at the utmost that treaty obligations are liable to certain restrictions in case their application should form what even Zitelmann does not clearly state as a recognized rule of international law. The opinion of Zitelmann may be of high value as a suggestion for future municipal legislation, but its arguments do not prove, and probably are not meant to prove, that any generally recognized rule of international law exists.[2]

So we come to the statement that there is no obligation fixed by the Law of Nations obliging States to cause to be applied a certain system of municipal law in the judgments which their Courts pass on the legal relations of corporations.

Recognition of Foreign Corporations.—The question whether a State is under obligation according to international law to recognize the existence of a foreign corporation has for many years been one of the most controversial problems of international law.[3] To-day this question may safely be said to be a merely historical one. There is nearly unanimity that no such obligation exists in international law, although the recognition of foreign corporations may be dictated by both international morality and comity. The opposite view, as represented mainly by v. Bar, was based partly on arguments as to what would be more just and reasonable, partly and mainly on the erroneous assumption of an international custom. That there is no such general custom is proved by the fact that, for instance, France and Belgium for a long time recognized foreign corporations only as far as they were obliged to do so by international agreements.

So we may state that there is no rule of international law obliging

[1] Similarly v. Bar: "Willkürliche Sitzbeilegung hat auf internationale Anerkennung keinen Anspruch."

[2] The problems of conflict of laws, of course, arise not only between the different systems of private and penal law, but also between different systems of administrative law. *Cf.* Neumeyer, *Internationales Verwaltungsrecht.*

[3] *Cf.* Young, *ubi supra*, pp. 22–64.

States to recognize corporate legal capacity which has been created by other States.[1]

Dissolution of Foreign Corporations.—Another question arises: Which State is it whose Courts have competence to dissolve a corporation, *i.e.* to destroy the legal capacity to acquire corporate (destined) rights? Whatever the aspects of this question may be in private international law, the legal position in public international law may be summed up in the following three rules, which are merely a repetition of what has been pointed out above, p. 86.

1. A State can dissolve only those corporations which have been created by its own municipal law, unless it is authorized by some other creating State to assume jurisdiction over its creations.

2. But in certain cases, for instance if a corporation cannot meet its obligations, any State may—

(*a*) Withdraw a recognition previously granted.

(*b*) Liquidate the corporate property within its reach.[2]

No State, unless by treaty, is bound to admit foreigners into its country, or to allow foreigners to carry on business within its territory. There is no reason why this rule should not be applied to private and corporate activities alike.[3]

Property and Rights of Foreign Corporations.—It is universally admitted that property and rights which have been acquired by foreigners standing under a *jus protegendi* are to a certain extent protected by international law. It would, however, be extremely difficult to delimit the extension of this protection: generally speaking, it may be said that such property is without doubt protected against the acts of

[1] Against the assumption of an international obligation to recognize foreign corporations, for instance (not all expressly): Vavasseur, *Clunet*, 1875, p. 5 (French non-recognition of a part of foreign corporations); Namur in *Clunet*, 1877, p. 381 (similar problems in Belgium); Cour d'Appel de Lyon, reported in *Clunet*, 1892, p. 479; Lainé in *Clunet*, 1893, p. 275; *Clunet*, 1915, p. 503; Lyon Caen in *Clunet*, 1917, p. 5; Schuster under f; Liszt, *ubi supra*, p. 105; Ruegger, *ubi supra*, p. 18. Reports of voluntary recognitions by systems of municipal law: Rolin, *Principes de droit international privé*, vol. i, p. 167; Hibbert, *International Private Law*, p. 189 (England); Liszt, *ubi supra*, p. 105 (Germany); Moore, *Digest*, iv, p. 19: "Recognition a commandment of international comity"; Foote, *ubi supra*, p. 126; Meili, *International Civil and Commercial Law*, p. 205.

General recognition recommended, for instance, by: Brocher, *Cour de droit international privé*, p. 101; Zitelmann, *ubi supra*, ii, p. 115; Borchard, *ubi supra*, p. 41; Young, *ubi supra*, p. 53: v. Bar, *Lehrbuch*, *ubi supra*, p. 52; with reference to Guenther, Foelix, Waechter, Brocher and Weiss, *ubi supra*, Rattigan, *Private International Law*, p. 44, following v. Bar.

[2] *Cf.* Pic in *Clunet*, 1892, p. 547; *Clunet*, 1911, p. 1116 (question of competence in Egypt); *Clunet*, 1914, p. 257; *Clunet*, 1916, p. 1292; Hibbert, *ubi supra*, p. 190: "Foreign corporations cannot be dissolved here" (English law); Leslie Burgin, in *Grotius Society*, ix: "Dissolution" is used here in the sense of "dissolution of legal capacity."

[3] *Cf.* v. Bar, *Lehrbuch*, *ubi supra*, p. 52; Schuster, *ubi supra*, p. 79, under g: "a foreign corporation is not, *ipso facto*, entitled to carry on business or to acquire land"; Ruegger, *ubi supra*, p. 17

individuals or officials for which the foreign State is responsible and which are unlawful according to the law of that State itself ("obvious crimes"); but there seems to be far less certainty as far as violation of property is concerned, which is authorized by the law of the responsible State (laws of taxation, confiscation, etc.).[1]

Corporate property which is under the recognized *jus protegendi* of a foreign Government is protected to the same extent as private property under the *jus protegendi* of the same Government.

International law protects the foreigner to a certain extent against being prevented from exercising rights and against losing acquired rights, but it does not protect him against prevention from acquiring rights.[2] Many States, for instance, do not allow foreigners to acquire landed property within their territory, but they would be entitled also to prevent foreigners from acquiring other rights.

The acquisition of corporate rights is no more entitled to protection than the acquisition of private rights, unless the acquisition be the exercise of some previously acquired claim to acquire a certain right.[3]

Right of Suit of Foreign Corporations.—While there seems to be nearly general agreement that every State can claim for its nationals abroad, or for the rights of its nationals abroad, a jurisdiction of a certain standard, most writers are of opinion that no State is under obligation according to international law to grant to corporations the right to sue.[4]

It is quite true that every legal capacity is only a creation of law, and

[1] On taxation of foreign corporations, Neumeyer, *Internationales Finanzrecht*; Lyon Caen in *Clunet*, 1917, p. 5; Loeb in *Clunet*, 1922, p. 325; Neumeyer in Neumeyer's *Zeitschrift*, Bd. 29 (1921), 49; English cases like *Goerz & Co.* v. *Bell* [1904] 2. K.B. 136.

[2] *Cf.* also my article "Der Stevenson Fall," in Strupp's *Wörterbuch des Völkerrechts und der Diplomatie.*

[3] This includes the capacity to acquire rights by contract usually incorrectly called the right to make contracts.

Of course, such exclusion might form part of another international delinquency, for instance, preventing foreigners from buying food, may amount to a wrongful violation of life and health.

Cf. the opinion of all those who deny an obligation of recognition, besides Schuster, *ubi supra*, p. 79 under g; Moore, *Digest*, *ubi supra*, iv, p. 11, declares the right of foreign corporations to make contracts as a commandment of the comity of nations and not of international law; Fauchille, *ubi supra*, p. 973, states as "système généralement admis par la doctrine et la pratique," that juristic persons have "la capacité d'acquérir des meubles et des immeubles." This, however, seems to be meant only as a statement of the general practice of municipal legislatures, not as a statement of a rule of international public law. *Cf.* also the discussion which took place in the end of the last century on the question whether foreign corporations can acquire rights by testament: Félix Moreau in *Clunet*, 1892, p. 337; A. Lainé in *Clunet*, 1893, p. 273, on the affairs Plessis Bellièvre and L. Renault in *Clunet*, 1893, p. 1118, on the same question; Woeste in *Clunet*, 1893, p. 1123, on a similar problem in Belgium, on the Rumanian affair, Zappa: Desjardin in *Clunet*, 1893, p. 1009; Flaischlen in *Clunet*, 1894, p. 282; Missir in *Clunet*, 1894, p. 776.

[4] *Cf.* again, the opinion of the writers which deny an obligation of recognition, expressly amongst others: decision of a French Court in *Sarah Bernhardt* v.

to that extent there is no difference between private and corporate legal capacity, but this would be no argument against a different treatment of the two capacities in foreign countries.

So far as a State does not recognize the legal capacity of a corporation at all, no difficulties can arise as to whether the foreign State is bound or not to grant jurisdiction to such corporation. Where no rights could be acquired or be recognized, there cannot possibly be any right to be protected by jurisdiction.

But where a State allows a corporation to acquire rights or acknowledge rights which have been created elsewhere it is difficult to see why acquired corporate property and other rights should be less protected by the right to sue than private rights. The only possible and rather formalistic argument against this reasoning would be that, a State which need not recognize rights at all is at liberty to recognize rights voluntarily with the restriction that they are not guaranteed by a right to sue.

I venture to suggest the formulation of the following rules :

1. There is no general obligation to grant the right to sue to corporations.

2. Corporate rights, which are under the *jus protegendi* of a home State, and which are recognized by a foreign State, ought to be guaranteed by the foreign State by allowing the corporation to sue.

3. Wherever, whether voluntarily or under obligation, a State grants to a corporation the right to sue, the obligations as to the standard of jurisdiction ought to be considered the same as in case of jurisdiction granted for the protection of private rights.[1]

Other Rights of Foreign Corporations.—It remains to examine the application to corporations of some other individual rights, which some writers[2]—rightly or wrongly—state to be protected by international law :

1. " Le droit de travail et de commerce " ; *cf.* above, pp. 103–4.

2. " Le droit de liberté de conscience et du culte."

The latter is hardly conceivable as a corporate right, but the former may belong to a corporation, *i.e.* be a corporative right.

Société danoise Det nordiske Ferlag, Clunet, 1911, p. 234 ; Moore, *Digest, ubi supra*, iv, p. 242 (comity doctrine) ; Liszt, *ubi supra*, p. 105. Of different opinion : v. Bar, *Lehrbuch, ubi supra*, p. 52 ; and Rattigan, *ubi supra*, p. 75. Not clear (*cf.* notes to p. 104) ; Fauchille, *ubi supra*, p. 973.

The French law does not grant to all foreign corporations the right to sue. Cour d'Appel de Paris, in *Kratz Boussac* v. *Société Eisen Werke Gaggenau* in *Clunet*, 1893, p. 588 ; Cour d'Appel de Lyon in *Geigy and Otto* v. *Badische Anilin und Soda Fabrik, Clunet*, 1892, p. 479 ; Lyon Caen in *Clunet*, 1917,. 5. On English and German practice and legislation, *cf.* Hibbert, *ubi supra*, p. 189 ; Liszt, *ubi supra*, p. 105. Questions of legislation discussed in Congrès international des Sociétés par actions, *Clunet*, 1890, p. 179.

[1] The very difficult question arises whether a State which does not grant the right to sue to foreign corporations is under an obligation of international law to admit a joint action of all members of the corporation. I think the question must be answered in the negative, because corporate rights are not the private rights of the shareholders ; but I should not like to express a final opinion.

[2] *Cf.* especially Fauchille, *ubi supra*.

3. " L'inviolabilité du domicile."

Domicile, in the meaning of this alleged rule of international law, means either " home " or " centre of business." While it is difficult to see how one can speak of the home of a corporation, rules concerning centres of business could be applied to centres of corporate business or of collective activity.

4. " Le droit d'admission aux hôpitaux et aux institutions " protects interests of a private and personal character, and will hardly be found as a corporate right.

5. " Le droit de liberté individuelle " could be a corporate right, and then ought to be under the same protection as a private right of the same character.

6. " L'inviolabilité de la personne." This rule is not applicable to corporations in the sense that " juristic " persons are as inviolable as " natural " persons. A natural person is a body endowed with a soul, a juristic person is a circle of regulated activities. So rules forbidding the violation of the life and limb of an individual are not applicable to a " circle of activities."

On the other hand, the personal safety of an individual can be a corporate instead of a private right.

7. " The *jus emigrandi.*"

Mamelock (p. 11) says that emigration of a corporation in the proper sense of the word is an impossible conception.[1] This statement is perfectly right. On the other hand, the question arises, what the situation would be if a State wished to prevent a foreign protected corporation from changing its administrative centre, which might be done not only by violence against foreign individuals and property, but, for instance, by influencing its own nationals, who happen to be officials and clerks of the corporation, not to lend their assistance to the contemplated change.

The foreign corporation, in such a case, certainly would not be protected by a *jus emigrandi,* and the only question is whether the change of the administration centre is one of the activities the liberty of which is protected by international law.

II. Vicarious Responsibility.—It is generally admitted that States have a certain vicarious responsibility for and a duty of supervision over the activities of their nationals.

As has been pointed out, corporate activities have no particular status in international law, so the vicarious responsibility for corporate activities would lie in general with the home State of the individual which commits the acts in question. A State ought to be responsible, however, for corporate acts of aliens as well as other acts of aliens if such acts were necessary according to the laws or commands of such State.[2]

[1] *Eigentliche Auswanderung ist undenkbar.*

[2] This would include responsibility for acts of foreign individuals, if such acts form part of corporate activities which fall under the described responsibility.

(To be concluded.)

DR. LUNDSTEDT AGAINST THE LAW OF NATIONS.[1]

[*Contributed by the* Rev. T. A. Lacey, M.A., *Canon of Worcester.*]

In one sense Dr. Lundstedt's argument is already out of date. It is directed against the Geneva Protocol, and for good or for evil the Protocol is dead. In another respect the book is before its time, being nothing less than a sustained argument for " the legal organization of the United States of Europe and America." This appears only on the last page, but, in the light of the title-page, every page between points to it. The preliminary task is to annihilate what passes for International Law. This is a chimera, a mockery, a false-pretence, which stands in the way of the consummation desired. The work of destruction is achieved by a further preliminary : a relentless criticism of Municipal Law, which is genuine law, showing that it has nothing at all in common with the pretended International Law. But no ; they have one thing in common, a wholly fictitious basis in superstition. Eliminate this, and Municipal Law stands firm on its true base, International Law disappears.

For anyone who enjoys an argument conducted with a big stick, the book will be enjoyable. The Swedish professor lays about him in noble style. Reasons alleged against him are " entirely devoid of reason," objections are " nearly related to positive stupidity," other adverse arguments " are, of course, based on chimeras." At this rate the argument gets on famously, and yet—well, when a Professor of Law tilts at all his colleagues in all the Universities of the world, except his own " master," a doubt will come creeping in, whether he may not sometimes be wrong.

The author's pen was set in motion by some remarks which fell from the President of the International Law Association in September, 1924. These were concerned with the assertion that there are " no law-makers for the nations, nor agents necessary for the administration of the law " ; an assertion which is the main ground for denying the existence or the validity of International Law. On the President's treatment of this theme he indulges himself with some heavy pleasantries, concluding that it " obviously presupposes the idea that it is perfectly natural that jurisprudence should be based on fantasies instead of on realities." To

[1] *Superstition or Rationality in Action for Peace ? Arguments against founding a World Peace on the Common Sense of Justice. A Criticism of Jurisprudence.* By A. V. Lundstedt, LL.D. Professor of Civil and Roman Law at the Royal University of Uppsala, pp. 239, Longmans, 12*s.* 6*d.* net.

combat this presupposition is the task which he sets himself. He then proclaims himself a realist, and he is a realist of the school of Hobbes, though even Hobbes does not satisfy him. It soon appears that the presupposition is general among professed writers on jurisprudence, taking the form of a belief that certain ultimate conceptions of right and wrong underlie positive law, and provide its sanctions. Such conceptions are what he means by fantasies, otherwise called superstitions.

Let it be said at once that he provides some excellent criticism in dealing with these. He tracks down, for example, a frequent confusion of morality and law. If he himself exaggerates the distinction, that is better than obscuring it. He also unveils some curious examples of circular reasoning. He has no difficulty in establishing the fact that much current morality is the product of law, and therefore cannot underlie it. Building on Feuerbach's theory of crime and punishment, he shows that punishment is not to be regarded as an outburst of moral indignation, still less should it be addressed primarily to the correction of the criminal or to prevention of a repetition of his crime; neither, he argues less convincingly, is it devised to be generally deterrent by way of example; in so far as it is preventive, it operates mainly—he seems to think exclusively—by setting in motion a wide-spread reaction against the particular actions which are stigmatized as criminal. He applies the same reasoning to the Law of Torts, complaining by the way of the English jurisprudence which excludes a breach of contract from that category. He thus arrives, to his own satisfaction, at the conclusion that a sense of duty is created by law, and therefore to make it the foundation of law is to move in a vicious circle.

What, then, is the foundation? For Dr. Lundstedt *salus populi* is not only *summa lex*, but the source of all laws. He is of the school of Hobbes, we have said, but he has too much of the historic mind to stumble as Hobbes did at the threshold of his system, and he puts aside the fiction of the original contract. "It is difficult," he says, "to suppose that the human beings—howsoever constituted—whom we imagine when we speak of the first human beings, constituted themselves a community at a single step." When the community arrives it begins to make laws for its own protection, and nothing else is law. But how does the community arrive? Like Hobbes, he pictures a "state of nature" without law, and asks how then there can be a Law of Nature. Elsewhere he argues against Duguit: "Without law the State is a mere phantom. Nevertheless the law is supposed to be founded on the State!" State and community may be distinguished, and the community may be said to form the State by the operation of law; but it is equally impossible to think of a community without law as anything but a phantom. "The very idea of a community," he says elsewhere, "implies the existence of a criminal law." So law is the product of a community which cannot exist without law. Dr. Lundstedt, so severe on the circular arguments of jurists, seems to be running after his own tail with the worst of them.

To escape from the circle, he speaks of "community-building instincts." Instincts are useful assumptions, but a writer who cries aloud for rationality should be shy of depending on them. Moreover, these instincts are presumably present in the state of nature, since they have to produce communities out of that state. Then there is no line of absolute demarcation drawn immediately above the state of nature, for the primeval community is a natural product, and so is every continuous development up to Grotius and beyond. So much we have learnt from theories of evolution, and we may rebuke Huxley for being faithless to his doctrine when he spoke of civilization cutting across and running counter to the course of evolution; for civilization also is evolved. So we get back to Aristotle, and man is by nature a political animal.

Some Law of Nature seems to be unavoidable, but for the avoidance of confusion it might be as well not to call it Law. Dr. Lundstedt makes an unconscious suggestion. The forensic Law of Nations was the work of Roman jurists at their best, and he justly remarks that it was rather a fruit of Roman law, albeit fictitious, than a root. What was the root? Dr. Lundstedt's history is too much for his theory. He remembers that *fas* was before *ius*. But this is the fantasy or superstition which he would root out of the origins of law. His realism also is too much for his theory; these fantasies and superstitions are no less real as facts of human experience than the purest rationality. They are really included in the stuff of Law, whether they be found in the *mana* and *tabu* of Polynesia, or in the majestic periods of Richard Hooker. Dr. Lundstedt is right in distinguishing morality and law, but he is hardly right in placing them; *mos pro lege* may be an admixture of incompatibles, but *mos ante legem* is as incontestable as *mores post leges*.

Dr. Lundstedt's elaborate preparation for his attack on the existence of International Law crumbles to pieces. It can hardly be necessary therefore to follow him in its application. But some detached comments are permissible. Grotius and Puffendorf are historical facts; no realist can afford to ignore them. Dr. Lundstedt does not say that there is no Municipal Law because all jurists use arguments which he finds defective and circular. Let it be that international jurists argue from fantasies and superstitions; it does not follow that the system which they expound has no objective existence. Dr. Lundstedt describes in eloquent terms the collapse of a civilized community that would ensue on the disappearance of Municipal Law: no commerce, no credit, no orderly communication; for these things are impossible without law. True; and international commerce exists, international credit is not an impossibility, and international communications are kept up; it seems to follow that there must be some international conventions corresponding to Municipal Law. There is, indeed, no superstate, such as a federal union of the States of Europe and America, capable of imposing positive laws; but is there nothing approaching it? The communities which have made Municipal Law were once inchoate, and were already making laws; or

rather they would be mere phantoms if they had no law ; may there not be already an inchoate *communitas communitatum*, making in this way a beginning of International Law ? Dr. Lundstedt quotes from Oppenheim, with the italics of which he is rather too lavish : " Violations of this law are certainly frequent. But the offenders *always* try to prove that their acts do *not* contain a *violation*, and that they have a *right* to act as they do according to the *Law of Nations*, or at least that no rule of the Law of Nations is against their acts." This statement, he replies, is " an absolutely destructive criticism of all the naïve talk of the existence of a Law of Nations." Are we to say that if an accused criminal, or the defendant in a civil action, puts up a similar defence, that is an absolutely destructive criticism of all Dr. Lundstedt's talk about the existence of Municipal Law ? But, he says, " it is a grave mistake to co-ordinate the individual State with the individual within a State." It would certainly be a mistake to press the analogy, but why is it to be altogether ruled out ? Because, he adds, " against the latter legal reactions are always irresistible." So our realist ; but a realist should avoid excessive generalization, and not least if it be an echo of Austin. He who repeats this generalization has to reckon with Professor Laski, and to ascertain whether legal reactions were irresistible against the miners of South Wales who defied the Munitions Act. If they were not, does it follow that the Municipal Law of England ceased to be ? Instances of the same kind abound in history. Many a bandit or truculent knight defied the King's Peace in medieval England, and died comfortably in his bed ; but the King's Peace did not cease to be. A bandit State may be in the same case. Frederick's seizure of Silesia did not prove that there was no International Law in the eighteenth century ; the question whether he really thought that he had been deprived of his legal rights, or only did lip-service to the law which he was violating, is so far irrelevant. The Constitution of the United States did not crumble into ruin because Massachusetts once defied the Federal Government, and the Federal Government could bring no effective force to bear on the recalcitrant State ; nor did it perish when John Brown of Ossawattomie with a band of armed men escorted fugitive slaves to a refuge in Canada. A successful, or even a tolerated, breach of the law does not prove that there is no law. A truculent State in Europe that fights for its interests or for a point of honour, in disregard of accepted principles of International Law, no more nullifies those principles than the prolonged immunity of duellists nullified the Criminal Law of England.

THE DECISIONS OF THE ANGLO-GERMAN MIXED ARBITRAL TRIBUNAL. III.[1]

[*Contributed by* EVERARD DICKSON, ESQ.]

THE most important event in the twelve months under review has been the establishment of a third division of the Tribunal. This was done pursuant to an Agreement between the two Governments dated September 13, 1924, Article 10 of which provided:

> With a view to the more expeditious hearing of cases coming before the Anglo-German Mixed Arbitral Tribunal and to minimizing to both claimants and respondents the cost of such hearing, it is agreed that a Third Division of the said Tribunal shall be constituted in accordance with the provisions of Art. 304 of the Treaty of Versailles. To ensure that the British and German members of such division shall be seized with an intimate knowledge of the material provisions of the Treaty and of previous decisions of the Tribunal given thereon and shall be familiar with the claims to be adjudicated upon, such members shall be selected from officials of or connected with their respective clearing offices.

Under Art. 11 of the Agreement, the new division has concurrent jurisdiction with the first and second divisions, but is to deal primarily with claims in which the parties and the clearing offices are willing that the Tribunal shall make an award upon the written documents put forward in the case, and without hearing the parties.[2]

The British member of the third division is Mr. G. E. Robinson, late Secretary of the British Clearing Office; the German member Geheimrat Detmold, the late German Government Agent.[3] The President is Dr. Algot Bagge, a Swedish jurist of great distinction.

During the temporary absence through illness of Baron D. W. von Heeckeren, the second division has been presided over by Dr. von Slooten, a Judge of the Dutch Court of Appeal.

The Tribunal has suffered a very great loss in the retirement of M. Eugen Borel, the President of the first division ever since the inauguration of the Tribunal. M. Borel's successor is Dr. Helge Klaestad of the Norwegian Foreign Office.

[1] See the *Journal of Comparative Legislation*, Third Series, vol. v, p. 17, and Third Series, vol. vi, p. 301.

[2] See the second part of paragraph 18 of the Annex to Section III, Part X of the Treaty of Versailles.

[3] Geheimer Justizrat Rodegra has also been appointed by the German Government. Both Herr Detmold and Herr Rodegra have sat temporarily with the first division.

Rules of Procedure.—The establishment of the third division has rendered it necessary to supplement the existing rules of procedure. The Rules of Summary Procedure are dated February 20, 1925.[1]

Amendments of the existing rules dated February 20, 1925,[2] and July 24, 1925,[3] respectively, make provision for the time within which claims under the provisions of Art. 296 are to be submitted to the Tribunal.

The amendments dated February 20, 1925, include an important new rule under which any party may, within six months of the delivery to the Government Agents of the copies of a decision, deliver a demand for its revision on the ground of the discovery of evidence referring to allegations made by such party before the decision, which,[4] "if known to the Tribunal when the case was before it previously, would have exercised a decisive effect upon its judgment and which could not by the exercise of reasonable diligence have been then produced by such party."

Conflicting Decisions.—It is a regrettable circumstance, and one of which notice must be taken, that there are not a few matters as to which the first and second divisions of the Tribunal have arrived at differing conclusions. The third division has been too recently set up to show clearly its tendencies in this respect, but it is at least improbable that this division will follow all the existing decisions.

Under the Treaty, each division is equally authoritative as an interpreter of the Treaty's provisions. No overruling body has been constituted. In the result conflicting decisions stand side by side.

Each division, naturally enough, is disposed to follow its own earlier decisions, and on more than one question, success or failure for the individual litigant is dependent solely upon the number of the division before which his cause is tried.

A most striking instance is afforded by the conflicting decisions of *Burns, Philip & Co., Ltd.* v. *Norddeutsche Lloyd*,[5] and *Dalgety & Co., Ltd.* v. *Norddeutsche Lloyd*.[6] In the former case the first division held that the master of the ss. *Pommern* had on August 3, 1914, abandoned the voyage, and the shippers were entitled to damages accordingly. In the latter case the second division held that the master of the ss. *Pommern* had not on August 3, 1914, abandoned the voyage, and in consequence another firm of shippers failed in their claim against the same shipowners. On a question of Treaty construction the first division, in *Rehder* v. *Landgesellschaft Wansee*,[7] in dealing with a case under Art. 296 (2), had laid down a rule with respect to the dates for the application of the test of nationality and had expressed the opinion

[1] Published by H.M. Stationery Office as Statutory Rules and Orders 1925, No. 177.

[2] Statutory Rules and Orders 1925, No. 176.

[3] Statutory Rules and Orders 1925, No. 807.

[4] Rule 6, an amendment of Rule 40.

[5] Vol. iv, *Recueil*, 637.

[6] Vol. iv, *Recueil*, 637.

[7] Vol. iv, *Recueil*, 291.

that under Art. 296 (1) the test of nationality was to apply not only on January 10, 1920 (the date universally accepted for the application of the test of residence), but also at the date of the outbreak of the war. In *Levy* v. *Heim*[1] the second division laid it down that January 10, 1920, is the only material date at which the tests of nationality and residence are to apply.

In Case 3,238, *Trustees of Isidor Morris* (*decd.*) v. *William Michaelis*,[2] the third division rejected, in the case of a pre-war debt, the dictum of the first division, and followed the second division in holding that the only material date is that of the coming into force of the Treaty.

It is understood that every effort is being made to discover a workable solution to the difficulty.

In the summary that follows the decisions are those of the first division unless otherwise noted.

Debts.—In Case 395, *Simon Biheller* v. *Max Kray*,[3] the German Clearing Office had admitted a debt as due to a British creditor. The Tribunal accordingly delivered a decision dealing with costs. The German Clearing Office failed to pass a credit to cover their admission and subsequently endeavoured to reopen the matter and contest the debt. This the Tribunal would not allow.

Parties.—No fresh considerations have arisen as to residence, and, with regard to the date of the application of the test of nationality, the three divisions appear to be in conflict, as has been stated above.

In Case 400, *Tannenbaum* v. *Prussian Treasury*, the debtor had died during the war intestate and without heirs. Under paragraph 1936 of the German Civil Code the Treasury of the State of which the deceased was a subject at the time of his death inherits as statutory heir. The Tribunal held that the debts of the deceased when the State is statutory heir cannot be considered as the debts of an opposing national under the provisions of Article 296.

A novel contention was put forward on behalf of the creditors in *Smith and Another* v. *Rheinhold*.[4] The creditors were the executors of one A, a Swiss national of English domicile, who died during the war, and consequently the creditors were within the first division's decision of *Rehder* v. *Landgesellschaft Wansee*, for on the date when the debt fell due it was due from a German national to a Swiss national. It was contended for the creditors that, for the purposes of Art. 296, domicile was the same as nationality. The Tribunal rejected the contention.

The Tribunal has said that it has been compelled, in more than one case, to disregard the provisions of national private law conflicting with the view it has taken of the meaning of the Treaty. It requires that there shall be before it as a party some existing person or persons against whom it can make an award.[5] In a case in which a debt was due by a German national who was resident in Germany on

[1] Vol. iv, *Recueil*, 642. [2] Unreported. [3] Unreported.
[4] Vol. iv, *Recueil*, 664. [5] See *Hambleton* v. *Buschgeus*, vol. iv, *Recueil*, 187.

January 10, 1920, but who subsequently died, proceedings were directed against the executors, although the heirs were, in German law, the parties really interested, and these were not all of German nationality. The first division allowed the claim against the executors because a judgment against them will, under paragraph 328 of the German Code, bind the community of heirs.[1]

The same problem has been dealt with differently by the second division in Case 2,414, *Mayer* v. *Mayer*.[2] In this case the Tribunal found as a fact that there was on January 10, 1920, a debt, and then directed the German Clearing Office to credit the amount of the debt to the British Clearing Office.

In a case brought before the Tribunal by the German Clearing Office, the British debtor had died intestate during the war. No grant of letters of administration had been made, and so there was on January 10, 1920, no living British debtor. The Tribunal held that the debt was not recoverable under the provisions of Article 296.[3]

During the war, bankruptcy proceedings were taken in Germany by German creditors against the debtor firm. Following upon these, in accordance with German law, a notice appeared in the *Handelsregister* on December 1, 1919, to the effect that the bankruptcy proceedings had been discontinued and the company had ceased to exist. The second division decided, in Case 1,690, *Reed* v. *Rieder & Peratoner*,[4] that, by reason of the fact that there was not in existence on January 10, 1920, a German national, between whom and the British creditor there was a *vinculum juris*, there was no debt within the meaning of Article 296 of the Treaty.

The Tribunal has upheld its decision that a British company in liquidation under the Trading with the Enemy Amendment Act, 1918, on the ground of enemy participation in capital is nevertheless a British national entitled to recover under the provisions of Art. 296. The Tribunal has declared that the liquidation under laws which postpone the claims of German shareholders does not alter the character of the company as a legal entity created by English law.[5]

Article 296 (1).—Under German law, in order to effect a binding contract for the sale and purchase of real estate, it is a necessary formality that there should be an offer and acceptance before a notary. Before the outbreak of the war the creditors (British nationals) had formally, and in accordance with German law, offered land in Berlin for sale to the debtor (a German national). The debtor, having decided to complete the purchase, made payments, and some of the steps preliminary to compliance with the formalities prescribed by German law for acceptance were taken, but the notarial declaration was not made, and consequently the property was not transferred in the register (*Grund-*

[1] *Redfern* (Paris) v. *Kappel*, vol. iv, *Recueil*, 645.
[2] Unreported.
[3] Case 2,415, *In re Bank für Handel und Industrie* v. *Goldstein*, unreported.
[4] Unreported.
[5] Case 2,057, *Dangerfield* v. *Kraus*

buch). The position therefore was, on the outbreak of the war, that no binding contract of purchase had been completed between the parties, and the creditors were not entitled to recover the purchase price.[1]

In two cases in which British stockbrokers have sought to recover money from German nationals, in respect of business conducted through third parties, the Tribunal has held on the facts that the stockbrokers failed to establish the existence of a contractual relationship between themselves and the German nationals.[2]

Article 296 (2).—A noteworthy decision was delivered by the Tribunal in the case of *Fairfield, Franklin & Co., Ltd.* v. *Ritter and the German Government*.[3] In this case a German director of a British company had purported to sell, after the outbreak of the war, the stock in Germany belonging to the company. The sale was made to the former agent of the company. The purchase price was to be paid after the war. The goods were then resold in Germany by the late agent, and the proceeds received by him. In these proceedings, which were brought by the company against the agent, it was held that the sale was void, as the director had no power to act. Further, as the agent had resold the goods on his own behalf, and not acting as agent for the company, he was not in the position of the agent in the case of *Wenner* v. *Englehardt*,[4] acting in pursuance of a pre-war contract, and in consequence the company was not entitled to recover the proceeds of the resales under provisions of Art. 296 (2). Under the provisions of Art. 304, the Tribunal awarded to the company the amount in marks which the agent had received as enrichment together with compensation under Art. 297 (*e*), against the German Government, in respect of the depreciation of this sum.

Payments pursuant to an informal understanding made during the course of the war by a German debtor for a maintenance of a son of the creditor at a sanatorium in Germany are not be set up in reduction or extinction of a pre-war debt.[5]

A verbal agreement to recognize a marriage settlement not in the form required by German law is dissolved under the provisions of Art. 299, and as no act was done or money paid by the beneficiary, no pecuniary obligation remained for settlement under the provisions of Art. 296 (2).[6]

In dealing with contracts of life assurance the Tribunal has held, applying para. 11 of the Annex to Section V, that when the assured has died during the war, the amount of the policy, less unpaid premiums is recoverable under the provisions of Art. 296 (2), together with interest at the rate of 5 per cent. per annum, from the date of death.[7]

[1] Case 52, *Tyler* v. *Busch*, unreported.

[2] Case 300, *Kohn & Goldschmidt* v. *Duisberg*, unreported, and Case 1,695, *Walter Sanderson & Co.* v. *Lesser, Nathan & Co.*, unreported.

[3] Vol. v, *Recueil*, 39.

[4] Vol. iii, *Recueil*, p. 760.

[5] Case 1,959, *Public Trustee* v. *Riesser*, unreported.

[6] Case 1,841, *Scholl* v. *Kleinroth and Another*, unreported.

[7] *Hahlo* v. *Law, Union and Rock Insurance*, vol. v, *Recueil*, p. 35.

Costs in respect of legal proceedings instituted against the debtors by the creditors, during the war, are not within scope of the clearing. Where, however, under an order of the Court, costs have been paid to the solicitor out of the proceeds of distress, and *pro tanto*, the amount which has been recovered by the creditors as a result of the distress reduced, the Tribunal has allowed the debtors to set off only the sum actually received by the creditors, and not the full amount realized on the sale of the goods distrained upon.[1]

Much attention and, indeed, much criticism have been directed towards the Tribunal's decisions in cases in which brokers on the London Stock Exchange continuing stock for German clients had acted not as agents, but as principals, and had themselves " taken in." In all these cases the brokers were acting as they were entitled to act, and the transactions between the parties were in a form which has frequently been recognized in the English Courts.[2] The position on the outbreak of the war was that the clients having, at the end-July account, purchased the amount of stock being continued, in accordance with their mid-July contract, the brokers had rebought the same stock from them at the making-up price of the end-July account, and had undertaken to sell and the clients had undertaken to buy at mid-August a similar quantity of the same stock at the making-up price of the end-July, plus the contango. The Tribunal has had to consider the effect of Art. 299 (*a*), under which any contract concluded between enemies is to be regarded as dissolved as from the time when any two of the parties became enemies, " except in respect of any debt or other pecuniary obligation arising out of any act done or money paid thereunder." The Tribunal, in two closely reasoned decisions, which analyse into its elements the juridical situation of parties to such contracts, has held that the dissolution of the contract leaves no pecuniary obligation outstanding, and that the broker is not entitled to recover more than the amount due to him at the end-July account.[3]

This is undoubtedly a hardship for the broker, but the provisions of Art. 299 (*a*) are cogent and these contracts neither fall within those classes saved from dissolution by para. 2 of the Annex to Section V, Part X, nor has their execution been required in the general interest under the provisions of Art. 299 (*b*).

Since the second interlocutory decision of the case of *Seligman, Weinberger & Pearson* v. *Dreher & Uhry*, attempts have been made to distinguish.

In *Albert Seligman & Co.* v. *Rothschild*,[4] it was said that the position was that stock had been purchased by the brokers for their clients, and that the brokers, having found the money, held the stock as security

[1] Case 598, *Leslie* v. *Vereinigte Kunst A. G.*, unreported.

[2] *Bentinck* v. *London Joint Stock Bank*, [1893] Ch.D. 120.

[3] *Seligman, Weinberger & Pearson* v. *Dreher & Uhry*, vol. iv, *Recueil*, 657, and *Wassermann Plaut & Co.* v. *Heinmann*, unreported.

[4] Unreported.

for a loan of money. An inspection of the books of the brokers showed *inter alia* that interest, which was charged at contango rates each fortnight, ran, not upon the balance of money owing by the client to the brokers, but upon the making-up price of the shares each fortnight. The Tribunal held that the brokers had failed to discharge the onus which lay upon them of showing that the transaction was not a continuation in which they were the " takers in." Again, in *Baer Ellissen & Co.* v. *Louis Wolff*,[1] it was attempted to show that the transaction between the parties was one of a Lombard loan, *i.e.* a loan against security given to the lender by the borrower. This the brokers failed to establish.

In Case 1,483, *Crews & Co.* v. *Guggenheim*,[2] the Tribunal admitted that it was possible that parties might agree to a bargain of loan renewed at each account day, but that it was upon the creditors to satisfy the Tribunal as to the existence of such a contract, which in this case they failed to do.

The Tribunal has upheld the principle that a broker who, acting as an agent on behalf of his client, has incurred liabilities towards a third party, is entitled to be indemnified in respect thereof. Owing to the fact that brokers frequently deal with the aggregate of a particular stock, difficulties have arisen in ascertaining the manner in which the position of any particular client has been handled, and in such cases the Tribunal has adopted the equitable expedient of the application of a principle of proportion. If, for example, £9,000 of stock are continued in the market and £1,000 " taken in," this proportion is applied to the stock of the client in question, and as to a nine-tenths it is assumed to be carried in the market, and the broker entitled to be indemnified. The remaining one-tenth drops out. The right to indemnity includes stock continued with the consent of the debtor (express or implied) with non-members of the Stock Exchange.[3]

The indemnity to which a broker is so entitled extends to the loss he has sustained by depositing his own securities in order to provide a margin. He is not, however, entitled to recover, after the outbreak of the war, any of the profit he would have made by so doing.[4]

A similar principle has been applied in a case in which a London dealer in furs had acted for a German dealer, as a result of which he became liable to a broker in London and was compelled to put his hand into his pocket in order to find the money to cover a loss. It was held that, in incurring on behalf of the German dealer a liability towards the broker, he had performed an act giving rise to a pecuniary obligation in respect of which he was entitled to be indemnified so long as he had acted reasonably, as, it was held, he had.[5]

[1] Unreported. [2] Unreported.
[3] *Seligman, Weinberger & Pearson* v. *Dreher & Uhry, supra.*
[4] *Hodding King* v. *Bruno Becker*, Second Interlocutory Decision.
[5] *Charles* v. *Lonier*, vol. v, *Recueil*, 33.

The principles enunciated by the Tribunal in *Huth & Co.* v. *Fahr & Setzer*,[1] and *Fruhling & Goschen* v. *Breyer*,[2] were applied in the case of *Im Thurn* v. *Ruben*.[3] In this case, the German debtor had requested Messrs. Im Thurn & Sons to accept the drafts of a third party, undertaking to refund any amount which the third party failed to provide. The third party failed to put Messrs. Im Thurn & Sons in funds to meet their acceptances, and they took advantage of the Treasury scheme under which the Bank of England advanced the necessary money, and they became liable to the Bank for funds advanced with interest at 2 per cent. over bank rate annually capitalized. The German debtor was held liable for the full amount of the liability incurred by Im Thurn & Sons towards the Bank of England.

Suspension.—The debtors, a Berlin firm, negotiated with the Hamburg branch of the creditors' Bank bills which had been drawn on firms in Australia. Owing to the outbreak of the war, it was not possible to send the bills to Australia, with the result that the creditors' branch in Hamburg was entitled to have refunded by the debtors the amount paid on the bills together with expenses. Under the German Imperial Decrees of September 30, 1914, and December 22, 1914, whilst the debtors were at liberty to pay the Hamburg branch of the creditors' Bank, the Hamburg branch was not able to enforce payment. In fact the debtors refused payment. The Tribunal held that this amounted to a partial suspension of the contract between the parties. Consequently the provisions of Article 296 (2) are applicable, and the creditors entitled to succeed.[4]

Article 296 (3).—In Case 2,518, *Hirst* v. *German Government*,[5] the second division dealt with the only case which has come to a hearing before the Tribunal in which the class of pecuniary obligation which the creditors sought to enforce fell within Art. 296 (3). The creditor was a holder of German Protectorate Loan, 1910, and Prussian consols, and the claim was for interest thereon accrued during the war. Through a misunderstanding the amounts due were collected by the Swiss Bank Corporation, and the coupons relating thereto surrendered to the German Government. The Tribunal held that by their receipt of the coupons against payment the German Government had acquired a good title to the coupons, and that the creditor therefore was not entitled to succeed, in spite of the general provisions of Art. 296.

Bankruptcy or Failure.—The swearing of an oath of discovery as to his assets (*Offenbarungseid*) by a debtor at the order of the competent German Court is, when the deponent discloses assets insufficient to discharge the claims against him, a formal indication of insolvency. If, therefore, this has been done before the outbreak of the war, the German Government's guarantee does not apply to the debt.[6]

[1] Vol. i, *Recueil*, 286. [2] Vol. i, *Recueil*, 680. [3] Unreported.
[4] Case 1,199, *Standard Bank of South Africa v. Hecht*; unreported.
Unreported [6] Case 2,101, *Baron & Salaman* v *Max Arendt*, unreported;

In Case 2,982 *In re A. E. Huebsch* v. *A. E. Huebsch & Co., Ltd.* (unported), the Tribunal interpreted the provisions of Article 296 (*b*) and para. 4 of the Annex to Section III under which the High Contracting Parties are also relieved of their guarantee of a debt "where the debt was due by a company whose business has been liquidated under emergency legislation during the war." The Tribunal held that this applied to a company the business of which could be considered as having been liquidated before January 10, 1920, as far as assets and claims in British territory were concerned. This view is applied and developed in Case No. 2,567 *In re Persische Teppichgesellschaft* v. *Persian Carpet Co., Ltd.*, (unreported), and Case No. 3,773 *In re Hugo Oppenheim* v. *Foreign Assets* (unreported).

Rate of Exchange.—In the settlement of debts between the nationals of States which have not adopted the clearing system and German nationals, the allied currency and the rate of exchange provided for in Art. 296 (*d*), and the rate of interest provided for in para. 22 of the Annex to Section III, do not apply.[1]

In other words, a debt in marks to an Egyptian national from a German national is payable in marks.[2] So, too, a debt in francs is payable in francs.[3]

Rate of Interest.—The Tribunal has accepted, as evidence of a contractual rate of interest of 1½ per cent. above Bank of England rate, the fact that in an account submitted on the side of the debtors relating to a period before the war the rate they admitted was, in fact, 1½ per cent. above the Bank of England rate prevailing for the time.[4]

In another case, whilst the debtors paid before the war without question the rate of interest charged by the creditors, from month to month the amount of the excess above the Bank of England rate varied. There was held not to be evidence of a contractual rate, and in consequence the Treaty rate of 5 per cent. was applied.[5]

In Claim 1,115, *British South African Explosives* v. *German Government*,[6] the Tribunal, in a claim under the provisions of Art. 297 (*e*) again considered para. 22 of the Annex to Section III. The Treuhänder collected interest on bank debentures which in the ordinary course of events would have been credited to the claimant by the bank. Pursuant to a pre-war contract the bank allowed interest on sums standing to the claimant's credit. In a claim for interest on the dividends it was held that, if the Treuhänder had not collected them, having regard to the provisions of para. 22 of the Annex to Section III, interest would not

[1] *National Bank of Egypt* v. *Bank für Handel und Industrie & German Government*, vol. v, *Recueil*, 18.

[2] Claim 647, *Margaret Williams* v. *Berlinische Lebensversicherungs Ges.*; unreported.

[3] Claim 651, *Mitwalli Salama El-Bahrawi* v. *Marie Walters*, unreported.

[4] *Hodding King* v. *Bruno Becker*, vol. iv, *Recueil*, 624.
Case 2,057, *Dangerfield* v. *Kraus*; unreported.

[6] Unreported.

have been recoverable, for it would have been interest on a sum due by way of dividend.

The Third Division has held in a number of cases that interest is not recoverable by a German creditor on debts vested in the Public Trustee when the vesting order mentioned not only the principal amount but in addition other sums due by the debtor to the creditor. In Case 3,069 *Wolff* v. *Morley* (unreported), the debt vested was the capital sum only, and interest was not mentioned. The German creditor claimed interest at the rate of 5 per cent. per annum on the amount of the debt until the date of payment to the Public Trustee. There was no contract between the parties to pay interest. The Tribunal held that, under both English or German private international law, the law to apply to the question in this particular case was English municipal law. Under English law the English debtor was not liable to pay interest. As to the Treaty interest, the Tribunal held that this could apply only to debts which fell within Article 296, *i.e.* those due on January 10, 1920. The effect of the vesting order was to deprive the German creditor of his right to recover the debt.

In Case 3,392, *Heraeus* v. *Griffin* (unreported), the Tribunal was satisfied that payment was to be by cheque on a bank in Germany, and as a result it held that German law applied to the question of interest, and awarded 5 per cent. from August 4, 1914, to the date of the payment to the Public Trustee.

Property Rights and Interest.—With the questions of cash assets and of seizures in occupied territory disposed of the jurisdiction of the Tribunal under the provisions of Section IV, Part X of the Treaty appears to have been invoked less frequently than formerly.

The Tribunal has delivered a number of decisions or claims in which the issue has been whether the matter complained of is or is not an exceptional war measure.

In Claim 460, *Standard Bank of South Africa* v. *German Government*, the claimants complained of the action of a supervisor appointed by the German Government who made advances to a German national out of the amounts standing to the credit of the claimants' Hamburg branch with banks in Germany. The advances were made against deposits which were in the hands of the claimants at London and Port Elizabeth. The Tribunal held that the appointment of the supervisor was an exceptional war measure and that his disposal of the moneys of the bank by advancing them came within para. 3 of the Annex to Section IV, Part X of the Treaty. Owing to British legislation the deposits were, at the time the advances were made, no longer a security. Consequently the supervisor's action had resulted in damage to the claimants in respect of which they were compensated.

Although the Imperial decree of September 30, 1914, did not apply to Egypt, for payments to that country were only expressly forbidden by Imperial decree dated October 14, 1915, there was an understanding

between a German debtor bank owing a large sum of money to an Egyptian national and the German Government that such money should not be paid. It was held that this understanding amounted to an exceptional war measure.[1]

In *Julia Meyer* v. *German Government*[2] the claimant held an endowment policy, under the terms of which the amount was payable in gold marks. The policy matured in February 1920. On September 28, 1914, the German Bundesrat promulgated a decree under which all promises to pay in gold were made unenforceable until further order. The claimant claimed under the provisions of Art. 297 (*e*) the difference in value of the amount of the policy in gold marks and paper marks. The Tribunal dismissed the claim. It was not expressly decided that the decree was not an exceptional war measure, but it was held that if the measure complained of was an exceptional war measure, the German Government before the policy matured had undertaken under Art. 297 (*a*) to discontinue or stay the measure, in which case the claimant would be entitled to recover the amount in gold marks.

That the German Government had not treated the decree as an exceptional war measure is not a ground upon which the Tribunal could award compensation.

On August 7, 1914, a decree was enacted in Germany in the following terms :

> Persons having their domicile outside Germany, as well as legal entities having their seat outside Germany, cannot bring actions for the recovery of claims which have arisen before July 31, 1914, before the German Law Courts until October 31, 1914.
>
> The proceedings in lawsuits pending before the coming into force of this decree shall be stayed until October 31, 1914 (page 360, Reichsgetzblatt.)

It was held by the Tribunal in Claim 235, *Stott* v. *German Government*,[3] that this was not an exceptional war measure within the meaning of the Treaty, for it was not one which had or will have " the effect of removing from the proprietors the power of disposition over their property," nor was the measure one which had as an object the seizure of " the use of, or the interference with enemy assets."

The question of internment has been again raised, not only in the claim of *Epstein* v. *German Government, infra*, but also in the Claim 649 *Gooding* v. *German Government*.[3] In the latter case, the claimant who had been interned was made a bankrupt. It was contended on his behalf that his internment had been the cause of his bankruptcy, and that it had resulted in the improfitable liquidation of his business. The Tribunal expressed its appreciation of the anomalous position of one whose property has been affected as the result of internment, but felt that the provisions of Section IV, Part X clearly excluded a claim for

[1] *National Bank of Egypt* v. *German Government & Bank für Handel und Industrie, supra.*

[2] Vol. iv, *Recueil*, 666.

[3] Unreported.

compensation for damage resulting from internment. In Claim 257, *Boyes* v. *German Government*,[1] it was held that the failure of German authorities to permit the removal of personal property on internment was not an exceptional war measure. In the same case, however, the Tribunal awarded compensation in respect of other personal effects taken over by the German authorities on the internment. As to these the German Government set up the defence that the articles were taken over as a measure connected with the internment, but the Tribunal held it to be a measure "taken with regard to enemy property" which had "the effect of removing from the proprietor the power of disposition over his property."

The outbreak of war resulted in the loss of their luggage by many British nationals returning to Great Britain. A large number of claims have been brought before the Tribunal under the provisions of Art. 297 (*e*), but these, without exception, have been unsuccessful. In each case, the owner has failed to establish that his property was subjected to an exceptional war measure. In so far as anything may have happened before August 4, 1914, the Tribunal is without jurisdiction to deal with the matter, for under para. 4 of the Annex to Section IV, Part X of the Treaty, such claims are reserved to a special arbitrator. The first measure forbidding the export of such property was not until October 1915, by which time it is difficult for claimants to establish that their property existed. The Tribunal, in dismissing the claims, has given the claimants leave to present a claim under Art. 304 if they should be so advised.[2]

The Tribunal refused to compensate the British partner in a business in Germany which was subjected to compulsory administration in a case in which, in the prevailing circumstances, and the absence of both the partners, it was not satisfied that damage had resulted from the setting up of the compulsory administration or the manner in which the administrator had performed his duties.[3]

The claimants in *Bethell* v. *German Government*[4] were the owners of freehold property at Garmisch, in Bavaria, where they conducted a *pension*. In July 1917 the property was sold by the liquidator appointed by the Bavarian Government. In fixing compensation, the Tribunal declared that it must find the real value at the time of the sale, to an owner who was not himself going to sell at the time. In so doing it disregarded depreciation due to other exceptional war measures which had affected the price realized at the sale. As to goodwill, the Tribunal held that this was not to be ascertained from profits made in ordinary circumstances before the war, but in the light of the conditions actually prevailing at the time of the sale and afterwards.

[1] Unreported.

[2] *E.g.*, Claim 1,611, *Kauffmann* v. *German Government*, unreported; and Claim 1,011, *Wilson* v. *German Government*, unreported.

[3] *Epstein* v. *German Government*, vol. iv, *Recueil*, 649.

[4] Vol. iv, *Recueil*, 638.

In Claim 2,153, *Bush & Co., Ltd.* v. *German Government*,[1] the Tribunal decided that the words " In German territory," in Article 297 (*e*) do not include German merchant ships lying in the harbour of another country.

In the somewhat unusual case of *Grossman* v. *German Government*,[2] the claimant, who was British born, was the widow of a German national, domiciled in England, who died during the war. On January 1, 1920, she resumed her British nationality. During the war, owing apparently to a notification by a German bank of the claimant's husband's account, in the belief that he was an Englishman, the Treuhänder required the bank to pay over moneys received by them for him. In fact, he was German and remained German to the day of his death. The claim was resisted on the ground that the measures, when taken, had been taken against German property. The Tribunal allowed the claim, and the claimant received under the provisions of Art. 297 (*h*) the sums collected before November 11, 1918, as cash assets and compensation for the depreciation of sums collected after that date.

In dealing with the cash assets of German nationals in its hands under Art. 297 (*h*) (2) an Allied Power which has not adopted the clearing system may determine whether, and the extent to which, such cash assets are to be applied by virtue of para. 4 of the Annex to Section IV, Part X of the Treaty, to the settlement of debts due to its nationals by German nationals.

In so doing the provisions of para. 14 of the Annex apply, and the Allied power makes the payment out of the funds in its hands in its own currency, at the pre-war rate of exchange, with interest. In the case of debts due to Egyptians, in respect of which the clearing procedure was not adopted, the British Government have not followed this course. Consequently, as has been explained above, a mark debt remains a mark debt. In *National Bank of Egypt* v. *Bank für Handel und Industrie & German Government* the Tribunal allowed a claim for the damage resulting from the depreciation in value of the mark whilst subject to exceptional war measures.[3]

Contracts, Prescriptions, Judgments. Article 300 (b).—In *Kerby* v. *German Government*,[4] the Tribunal compensated the personal representatives of a British national who was the tenant of a flat in Berlin. In June 1918 the landlord obtained an order for possession of the flat. The order was carried out by the bailiff who cleared out the furniture. At a later stage, pursuant to para. 885 of the German Code of Civil Procedure, the contents of the flat were sold at an undervalue. No notice was given to the late tenant of the order for the sale of the furniture. The claim was held to fall within the provisions of Art. 300 (*b*).

Article 302.—In Claim 1,651, *Reynolds* v. *Steiger & Fischer*,[5] the Tribunal set aside a declaration by the Landgericht at Chemnitz, in proceedings instituted by the respondents, then in liquidation, to the effect

[1] Unreported. [2] Unreported. [3] See *supra*, p. 119.
[4] Vol. v, *Recueil*, 13. [5] Unreported.

that there was no longer in existence a claim by Messrs. Reynolds against the respondents. Until set aside, this declaration was a bar to the recovery of a pre-war debt in the clearing procedure.

In Claim 321, *Cook* v. *German Government & Bobe*,[1] the Tribunal laid it down that it is not sufficient for a British national to establish that by reason of what happened, he experienced difficulty in making his defence. It is necessary to show that he has really suffered prejudice. Unless this is established the Tribunal will not interfere with the judgment of a competent Court.

Article 304.—The second division in Case 2,307 *Stein* v. *Continental Caoutchouc & Gutta Percha Co.* has interpreted the words " all questions . . . relating to contracts " as meaning all questions now (*i.e.* at the date of the coming into force of the Treaty) subsisting with regard to contracts.

The most important " questions relating to contracts " arose in the cases which have already been referred to, viz. *Burns, Philip & Co.* v. *Norddeutsche Lloyd, Fairfield Franklin & Co.* v. *Ritter & the German Government,* and *National Bank of Egypt* v. *Bank für Handel und Industrie and the German Government.*

Industrial Property. Art. 310.—In its decision of Case 1,509, *Ascherberg Hopwood & Crew* v. *Quaritch,* the Tribunal considered the meaning and effect of Art. 310 under which licences in respect of industrial, literary or artistic property between Allied nationals, and persons residing or carrying on business in Allied territory on the one part, and German nationals on the other part, are considered as cancelled as from the date of the outbreak of the war. The German debtor sought to set off against a claim by a British firm royalties for the publication during the war of a musical play. It was held by the Tribunal that the effect of Art. 310 was to cancel licences completely without reserving to the licensor the right to recover (except in the special circumstances provided for later in the Article) royalties for use during the war.

In the course of the hearing the German Government agent had invited the Tribunal to base its interpretation of the Article upon the correspondence between the Allied and Associated Powers on the one hand and the German Peace Delegation on the other hand before the signature of the Treaty. The Tribunal, in its decision, declared that, whilst it had on more than one occasion referred to the interpretation of the Conditions of Peace by the Allied and Associated Powers, it had done so only when the Treaty itself had given no clear indication, and where it was not satisfied as to the intention of the High Contracting Parties. It declined to base its interpretation of this provision of the Treaty on any other document, holding that the meaning of the Article is clear.

[1] Unreported.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Dominions and the Locarno Pact.—The conclusion of the Locarno Pact[1] has evoked from the Dominions the normal response. In New Zealand the Prime Minister, following closely in the footsteps of Mr. Massey, has asserted the intention to secure the approval of the pact by Parliament in due course, and has explained the fact that the pact was not signed by a New Zealand representative for the Dominion on the score that Parliament had not been consulted and such a step, therefore, would have been improper. The argument is not wholly satisfactory on logical grounds; the signature of the treaty of peace with Germany was given before the New Zealand Parliament had been or could have been consulted; but clearly New Zealand could not well have acted alone. In the other Dominions this eagerness to accept British policy has not been evinced. Both Mr. Mackenzie King and Mr. Meighen declined to commit themselves to expressions of intention during the electoral campaign, and Mr. King's warm congratulations to Sir Austen Chamberlain on his K.G. must not be taken as signifying more than admiration for the achievement of the pact, and certainly not any desire to ask the Dominion Parliament to assume responsibility under it. Mr. Meighen indeed has made any such action extremely difficult by propounding,[2] under the fire of criticism for his party's share in the adoption of compulsory military service during the late war, the doctrine that Canada should not take part in any war by despatching troops unless and until a decision to that effect has been obtained from the people at a general election held for the purpose. The doctrine has not, it is plain, been received with much enthusiasm by many of his English supporters, and it is clearly intended to secure the Conservative Party a better chance of success in Quebec by assuring the habitants that the participation of Canada in future wars will be very fully authorized. It is, however, clear that it will be hard for any political leader in future to repudiate the doctrine, and that in these circumstances it will be more and more difficult for Canada to accept international obligations with any assurance of being able to honour them effectively when the time comes. Canada,

[1] *Cf.* this *Journal*, Third Series, vol. vii, pp. 196 ff.

[2] Speech at Hamilton, Ontario, November 17, 1925. It is fair to remember that Mr. Meighen had been accused of being willing to send Canadian troops abroad even without consulting Parliament.

it will be remembered, took no step to accept obligation under the treaty with France of June 28, 1919, to secure the protection of France in case of German attack, which fell through owing to the abstention of the United States, and every consideration of prudence suggests that her action as regards the Locarno Pact will follow that model. It is equally unlikely that General Hertzog, who recognizes the merits of the pact, will seek to induce his followers to reverse the policy of abstaining from obligations in respect of European politics, and there is no unanimity even in governmental ranks in the Commonwealth as regards the wisdom of bringing Australia formally under any obligation.

Effect of the Pact on the Empire.—General Smuts has not unnaturally shown anxiety lest the Locarno precedent may not lead to the various parts of the Empire going their several ways, and has pointed to the danger of the time coming when there will not be the feeling of obligation of each part to assist in defending the right of any other part. More pessimistically it has been contended [1] that Mr. Merriman was right in holding that the creation of the League would lead to the disintegration of the Empire. There is no doubt that the fact that Britain was driven to separate action is really to be regretted, but the defence made for her decision by the Government [2] is clearly unanswerable. It was felt, and the reasons adduced seem convincing, that opportunity should be taken of the chance of bringing European relations back to something approaching normality, and it was obvious that the Dominions were not in a position to accept responsibility in the matter. The only mode of procedure, therefore, was the device adopted for the abortive treaty of June 28, 1919; the pact was signed for the King, but its obligations were not imposed on the Dominions or India unless expressly accepted by the Government of a Dominion or India. There is a deviation in this formula from that adopted in 1919, when the Parliament of a Dominion was specified as the authority to accept the obligation. The difference of phrase may be excused by the addition of India in the case of the pact, seeing that the Indian Legislature is not yet a true analogue of a Dominion Parliament, but as regards the Dominions the phrase of 1919 had the merit that it recognized the fundamental fact—recognized in practice in the United Kingdom—that no Government is entitled to accept any international obligation of any importance without the express assent of Parliament. In point of fact no Government in any Dominion would dream of acting save with such consent, but it is unfortunate that the express admission of this fact in 1919 should not have been followed in 1925, when the principle had obtained conclusive force by reason of its repeated assertion in practice in the Dominion Parliaments since the participation of the Dominion Governments in the peace conference.

The Irish Boundary.—Not less satisfaction has been felt in the

[1] Mr. Richard Jebb, *Morning Post*, October 23, 1925.

[2] Mr. Chamberlain, House of Commons, November 18; Lord Balfour, House of Lords, November 22, 1925.

Dominions than in the United Kingdom over the fortunate settlement of the boundary issue.[1] The treaty of 1921 was unquestionably unsatisfactory, representing a patched-up agreement which neither side expected to come into full operation. That the Irish Free State should ever bear a portion of the burden of the British national debt was wholly contrary to the principle of conceding Dominion status, while it was not less clear that it would run wholly contrary to the purpose of the British Government if the boundary were altered in such a manner as to deprive Northern Ireland of its power of life. Doubtless the promise of aid in meeting the burden of debt won in England some support for the treaty, while in the Free State opinion was conciliated by the impression that the boundary clause would in practice turn out to be the lever by which Irish unity would be brought about. In this sense the terms of the treaty may be justified, but it is clear that the boundary clause has been the source of grave unrest and difficulty, and its final quietus even at the cost of the surrender of the considerable sums[2] which the Free State ought to have paid, but had no intention of paying, may be welcomed. Incidentally it is fortunate that in the fresh treaty it was possible to secure that Great Britain should be relieved of the position, humiliating and unjust, of having to bear the burden of the damage caused by her forces in suppressing rebellion in Ireland. It is true that the terms of repayment —£150,000 at once and £250,000 a year for sixty years—are extremely generous, having regard to the fact that the sum represented is put at 5 millions; but against this concession may be put the fact that the Free State has undertaken to increase by 10 per cent. the awards—often inadequate—made under the Free State Act of 1923 regarding compensation for damage to property, the total cost being put at £1,000,000 payable in 5 per cent. stock redeemable in ten years. The British Government further has given Northern Ireland a grant in aid of £1,200,000 in respect of the cost of the special charge on the resources of the territory hitherto necessitated to secure the safety of the boundary. By an obvious piece of common sense Northern Ireland has also been given the powers which under the Act of 1920 were assigned to the Council of Ireland, but which became wholly out of place when the Free State was created. The possibility of happier relations in future between the two Governments in Ireland is suggested by the arrangement that they shall meet together as and when necessary for the purpose of considering matters of common interest arising out of or connected with the administration of the powers in question. This provision justifies the curious form of the new agreement, which, while it is essentially a modification of the treaty of 1921 with the Irish Free State, is signed by representatives of Northern Ireland as well, though that territory cannot be said to be a contracting party. The anomalous nature of the instrument is interest-

[1] See the Ireland (Confirmation of Agreement) Act, 1925.

[2] The British claim was for £128,000,000, or, with accumulated interest, £155,000,000.

ing as another proof of the elasticity which must govern the relations *inter se* of parts of the Empire. In view of the imperial value of reconciliation, it is undesirable to comment on the events preceding the settlement, beyond noting with satisfaction that the British Government [1] declined for a moment to entertain the suggestion that the resignation of the Free State member of the Boundary Commission prevented the giving of a final decision by that body. Arbitration within the Empire would be utterly valueless if it were to work merely on the basis of unanimity, and agreements must be kept in good faith as much within as without the Empire.

The Constitutional Position of the Prime Minister.—The Canadian general election was productive of curious results in that not only did the Government fail to secure a majority over the other parties, but it was returned with a distinct inferiority of numbers to the Conservatives, and the Prime Minister himself and his most important colleagues suffered defeat. A strong protest was immediately made by Mr. Meighen,[2] who claimed that constitutional usage required that the Prime Minister should resign office and that the Governor-General should commission him to form a Ministry. It is clearly impossible to sympathize with this claim, which violates every principle of the orderly conduct of responsible government. The essential principle of administration is that the government must be carried on, and that it must represent as far as is possible the majority in Parliament. The first objection to a change of Ministry was the dislocation consequent on a handing over of portfolios to men without recent experience of the problems which are being dealt with in the departments ; the second was the absolute uncertainty existing when the result of the elections became known, as to the future relations of the parties, and the great probability that a Conservative administration would be defeated by the combined votes of the Liberals and Progressives who in the preceding Parliament had normally opposed the Conservatives. Mr. King's position was clearly correct ; he held that it was the duty of the Ministry, under these circumstances, to hold office until the House of Commons had decided the question, and that in the interval it ought strictly to refrain from any but routine business. He rejected, on this ground, the suggestions made to him that he should advise a second dissolution and ask the people to decide definitely which party was to govern, and the proposal that he should take steps to secure re-election for himself or any of his defeated colleagues to the House of Commons before the House met, while positively he advised the calling together of Parliament at the earliest possible moment after the completion of the elections. The absolute correctness of his attitude is a welcome proof of the development of the doctrine of responsible government in Canada, freeing the Governor-General from the burden of personal

[1] See *The Times*, November 26, 1925.

[2] Manifestoes were issued by both sides on November 5, 1925, and Mr. King reiterated his position on November 18.

intervention in a matter which ought to be decided by the votes of the chosen representatives of the people. In this regard the attitude of successive Governors-General is instructive; Lord Aberdeen felt called upon to bring about Sir Charles Tupper's resignation by declining to approve various proposals made by him after the defeat of his party at the polls of 1896; Lord Grey did not interfere with Sir Wilfrid Laurier's recommendations for appointments, etc., after his defeat in 1911, leaving the incoming Government to reverse them at its discretion, as was clearly the wiser course of action, and Mr. King has carried the development a step further by refraining from exercising the power to recommend any but essential or trivial appointments so long as it remained uncertain whether he had a parliamentary majority.

The Swamping of the New South Wales Council.—A very different picture is presented by the action of the Labour Government of New South Wales in pressing on the Governor the advice to swamp the Legislative Council by the wholesale addition of twenty-five of its nominees. The result of the last general election saw Labour given a clear majority over all other parties of two or, if an odd member claiming to be Protestant Labour is added, four, reduced by the appointment of the Speaker to a normal three. As early as October the new Government raised the question of a large number of appointments apparently in order to secure the consent of the Legislative Council to its own abolition, but this demand was for the time being dropped. On November 23, however, the request for twenty-five members was brought forward, and the Governor learned on December 3 from the Secretary of State for Dominion Affairs that the matter was one which ought to be settled between him and his ministers, so that it was not possible to give him any directions as to his action. The Governor then offered to concede fifteen appointments,[1] but this was refused, and on December 17 the Governor gave way and agreed to make the twenty-five appointments desired if the Ministry advised the step and the Attorney-General certified that it was constitutional. It is clear that the Governor was entitled to act as he did in the absence of any rule imposing on him personal responsibility for securing the retention of the Upper House as an effective revising body, especially as the Prime Minister assured him that the question of abolishing the Council was not under consideration, that the addition of the members in question would not prevent the Council performing useful functions, and that the new members were required to secure fair consideration of Labour proposals by the Council. It is equally clear that a body which could thus have its numbers ludicrously enlarged—from 74 (many ineffective through old age or ill-health) to 99—until it counted more members than the elective House, served no useful purpose, and that, like the Queensland Upper House,[2] which was abolished in 1922, its period of

[1] From the figures of voting on Government bills this number would clearly have secured the passage of most Labour measures.

[2] *Cf.* Keith, *War Government of the British Dominions*, pp. 251 ff.

effective service was virtually at a close.[1] But it is also clear that it was not justifiable for any Government, on the strength of so slender a majority, to give the Governor no choice between yielding to their demand or being compelled to seek another Premier, with the certainty that a dissolution of Parliament, with its attendant expense and loss of time, would be inflicted on the people so soon after the general election. It is intelligible that incidents of this sort have been adduced in support of the practice of appointing Governors from England in preference to local appointments, but the argument is plainly inadequate. Sir Dudley de Chair's surrender proves that Governors are no longer prepared to stand between ministers and their desires, and above all it is clear that the people of so large a State as New South Wales must learn by experience, if in no other way, the necessity of accepting full responsibility in lieu of hoping that an external obstacle will be interposed between them and their mistakes. It must be remembered also that, even under the existing system of appointments *ab extra*, there come times when the Governor is absent and the functions of the office are performed by a local man, and in the long run the wisest course must be to accept the doctrine that the Governor should as closely as possible assimilate his action to that of the Crown in the United Kingdom. In this case, if the people of New South Wales really resent the action of the Labour Government, they will have an opportunity in less than three years to express their disapproval, when they will have had the advantage of a prolonged experience of one-chamber government.

The Governor-General and Imperial Relations.—The steady tendency to restrict the functions of Governors-General, as well as Governors, to those of formal representation of the Crown has brought about the raising of the question whether their services might not be more freely employed than is at present the case for maintaining contact between the Governments of the Empire in regard to the conduct of foreign affairs. If this idea were developed it would mean the selection of Governors-General largely in view of their capacity to act as counterparts of ambassadors to foreign States, and it would obviously be natural to select men with actual diplomatic experience and wide knowledge of foreign affairs to serve as links of connexion between the Foreign Office and Dominion Governments. A variant of this suggestion is the proposal that in the great Dominions the United Kingdom should be represented also by officers with quasi-diplomatic functions; but it is clear that this suggestion is distinctly premature, and would not be welcomed in any Dominion, nor would it be easy to find adequate work for such officers. It is difficult to see any really valid objection to the wider use of the Governors-General[2]

[1] It is not surprising that by January 8, 1926, the Premier had decided that the Council should be induced to terminate its existence in return for the grant of railway passes and retention of the style of Honourable for life.

[2] It would, of course, be necessary that the posts should cease to be political appointments in any sense.

for this purpose, especially as they still form an essential chain in the communication of imperial views to the Dominions, although this is also carried on through the High Commissioners and direct correspondence between Prime Ministers is allowed. It is desirable to note that a certain degree of interest is being awakened in the Dominions in the suggestion to give their High Commissioners in London something more closely approaching ambassadorial functions; but the time is still apparently distant when any Dominion will see fit definitely to adopt such a course of action; New Zealand is especially firm in rejecting the proposal, though in point of fact its High Commissioner, Sir James Allen, has in large measure fulfilled the purposes envisaged in the proposal. The essential fact, however, which dominates the whole position is that the Dominions will secure effective representation and participation in the decision of British foreign policy if and when they decide that they desire to share fully in the taking of decisions and in responsibility for action thence arising, and this is still far from being the case.

The Barring of the Prerogative Right of Appeal.—Mr. E. R. Cameron, in a recent issue of the *Canadian Bar Review*,[1] has revived the question of the right of colonial Legislatures to bar the prerogative to grant the right of appeal to the Privy Council. He suggests that the decision of *Cuvillier* v. *Aylwin*[2] in 1832, which held that the prerogative could validly be barred by a local Act,[3] made under the general authority of an Imperial Act, should be preferred to that in *Cushing* v. *Dupuy*[4] in 1880, when it was held that the prerogative must not be deemed to have been abrogated when no specific words to this effect were used. He supports his preference for the earlier decision by animadversions on the capacity of the judges who decided *Cushing* v. *Dupuy*, pointing out that they were responsible also for the decision in *Russell* v. *Reg*,[5] which has since been almost relegated to oblivion by subsequent judgments of the Judicial Committee. This form of argument, however, is not satisfactory; even assuming that *Russell* v. *Reg.* was wrongly decided—and on that matter opinions may differ—the question as to *Cushing* v. *Dupuy* is really not affected by any error made in another case. It must, therefore, be judged on its merits, and these are overwhelming. The decision stresses two points quite fatal to *Cuvillier* v. *Aylwin*; in that case the Court ignored the express proviso (s. 43) in the Act limiting appeals which laid it down that nothing therein contained should derogate from the prerogative of the Crown; secondly, it took no notice of the rule of law that express words or something equivalent are necessary to bar a prerogative. It appears that the first point was mentioned before the Court, but in its judgment it ignores the matter and the omission to deal with it renders the weight of the judgment *ipso facto* small. It is in fact clear that the decision in *Cushing* v. *Dupuy* was inevitable, once the Court turned its attention to the question in all its aspects, and *Cuvillier* v. *Aylwin* must

[1] Vol. iii, pp. 547 ff. [2] 2 Knapp 72. [3] 34 Geo. III, c. 6.
[4] 5 App. Cas. 409. [5] 7 App. Cas. 829.

be regarded as one of the not infrequent rather defective judgments of the earlier days of the Court.

The Statutory Regulation of the Prerogative.—Mr. Cameron further ignores the fact, which indeed is often insufficiently stressed elsewhere, that there is now no possibility of barring the prerogative by any Canadian Act, whether provincial or Dominion. The Imperial Act of 1844 is explicit in terms; it confers a right to grant leave to appeal which can indeed be taken away, but only by an Imperial Act.[1] It is true that Ontario [2] purports to deny the right of appeal save in certain specified cases, but this merely means that no appeal lies save by special leave in these cases. Nor is Mr. Cameron right in thinking that any constitutional issue as between the provincial right of legislation regarding appeals and the authority of the King in Council was involved in the proposals made after the Colonial Conference of 1907 for the provision by Orders in Council of uniform terms regarding appeals to the Privy Council. The only question really involved was whether these appeals should be regulated on a uniform basis by Orders in Council under an Imperial Act or by local legislation, and the general assent of the provinces and of other parts of the Empire was based on the recognition that no constitutional issue was or could be involved.[3] Nothing in the legislation in any case attempted to limit the prerogative to grant special leave; all that was at issue were the cases in which appeals lie without such leave, and, as the Judicial Committee is an imperial body acting under imperial statutes, it was clearly perfectly constitutional that the terms on which such appeals should lie to it should be determined by Orders in Council under an Imperial Act, the terms of such Orders, of course, being decided upon in accordance with the wishes of the Governments and Courts concerned.

Appeals from the Irish Free State.—The decisions of the Judicial Committee of the Privy Council in respect of three recent appeals from the Irish Free State are of importance as indicating the extent to which the Committee considers it proper to reconsider the judgments of the Free State Courts. Under the Constitution of the Free State the right to grant special leave to appeal from decisions of the highest Irish Court, the Supreme Court, is unlimited, and it is clear that the Privy Council is not disposed to adopt too narrow a view of its powers. It is significant that it declined [4] to grant leave to appeal from a decision of the Supreme Court, holding that under the Canon Law of the Roman Church it was possible for the Bishop of a Church to issue a decree removing a parish priest from office without giving him any notice of the proceedings as a result of which the decree was pronounced. Clearly there are strong grounds on which intervention in such an issue by the Privy Council

[1] Keith, *Imperial Unity and the Dominions*, pp. 368 ff.
[2] Revised Statutes, 1914, c. 54, s. 2.
[3] Keith, *Responsible Government in the Dominions*, vol. iii, pp. 1361 ff.
[4] *O'Callaghan* v. *O'Sullivan*, *The Times*, December 8, 1925.

would be imprudent. On the other hand, it gave leave to appeal in a technical issue [1] affecting the power of the Land Commission in the Free State to control land, the tenant of which died prior to the appointed day under the Irish Land Act, and over which it was accordingly contended by the petitioner the Commission never had any legal authority. The other case [2] in which leave was given was of a different character; it concerned the mode in which compensation should be calculated in accordance with the treaty provisions regarding the treatment as regards pensions to be meted out to judges, officers of the police forces and civil servants formerly employed under the British Government, whose services were dispensed with on the creation of the Free State. In this instance it would hardly have been possible to decline intervention.

Criminal Appeals.—It is curious how incessant is the effort to induce the Judicial Committee to reverse its rule that it will not act as a Court of Appeal in criminal cases unless it is shown that by disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. In *Shafi Ahmed and others* v. *The King-Emperor* [3] among the grounds adduced for the grant of leave to appeal from the Sessions Judge of the High Court of Bombay was the refusal of the Governor-General to order that the trial should not take place in Bombay, and it is not surprising that their Lordships animadverted strongly on the impropriety and uselessness of such a demand. In the case of *Anandrao Gangaram Phanse* the substantial ground was the allegation that the judge failed to bring home adequately to the jury the fact that the crime of abetment to murder could not properly be inferred from conspiracy to kidnap unless the natural result of such an attempt was murder. The Committee naturally held that, even assuming that there was any substance in the criticism, it was clearly not a matter which brought the case within the category of disregard of the forms of process or violation of the principles of natural justice. These cases of futile applications do unquestionably raise the question whether the time is not approaching when criminal cases should formally be excluded from the possibility of appeal.

The Commonwealth Parliament's Powers in regard to Deportation.—The decision [4] of the High Court of the Commonwealth to order the release of Messrs. Walsh and Johannsen, whose deportation had been ordered by a Board appointed under the Immigration Act, though disappointing to the Commonwealth Government and though apparently not anticipated by its legal advisers, was hardly to be wondered at. The provisions under which the deportations were ordered by the Board were inserted in the Act as part of the effort to combat the grave disorder created in the Commonwealth by the strike of British seamen instigated and supported by Labour agitators in the Commonwealth The Act

[1] *Lynham* v. *Butler*, reported *ibid.*
[2] *Wigg and Cochrane* v. *Attorney-General of the Irish Free State*, reported *ibid.*
[3] *The Times*, November 6, 1925.
[4] *The Times*, December 19, 1925.

accordingly was altered in July to authorize the issue by the Governor-General of a proclamation declaring the existence in the Commonwealth of a serious industrial disturbance threatening its peace, order or good government and, while such a proclamation was in force, authority was given to the minister to order the appearance before a Board with a view to showing cause why he should not be deported, of any person, not born in Australia, who, he was satisfied, had been concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce with other countries or among the States, or the provision of services by any department or authority of the Commonwealth, and whose presence in Australia would in his opinion be injurious to the peace, order or good government of the Commonwealth in relation to matters falling within the legislative authority of the Commonwealth. Some exception was taken to the provision of deportation and the use of a Board, appointed by the Government, to decide such cases not only by the Labour Opposition, but also by Mr. Hughes, who preferred more normal punishments and the use of ordinary Courts. The High Court has had no difficulty, though on varying grounds, in holding that the Act as amended was *ultra vires*. The case for the Government rested on the claim that the provision assailed was valid under the powers of the Commonwealth to make laws for immigration or emigration, inter-state and foreign commerce, and matters incidental to the execution of any powers vested by the Constitution in the Parliament or governmental authorities of the Commonwealth. The Chief Justice held that the provision attacked must not be construed to apply to persons who had become identified with the Australian community; but, even apart from this view, he ruled that the enactment could not be brought within the powers adduced; deportation was not included under emigration, and the effort to confer on the Minister the power to decide what matters were within the ambit of authority of the Commonwealth was not valid under the Constitution. Mr. Justice Higgins held that the Act must be read as applying to all immigrants, however much they might have become members of the Australian community, and that on this score it must be deemed invalid. Mr. Justice Rich held that the Act applied only to persons who immigrated into Australia after the formation of the Commonwealth, a view shared by Mr. Justice Isaacs, who pointed out that on this view the Act was inapplicable to Mr. Walsh but affected Mr. Johannsen; but the former held further that there was no proof that the Minister was satisfied as to any specific acts of the men whom it was proposed to deport, and the latter ruled that the accused was entitled to reasonably definite information of the grounds on which deportation was desired. Mr. Justice Starke held that both the accused had become members of the community, and the legislation could not be supported against them. The position of the Court was, in fact, not altogether easy, because, while it was clear that it could not uphold the

new use of deportation, it was anxious not to use any terms which might imply that the Commonwealth had not authority to exact its existing legislation which permits in certain conditions the deportation of immigrants after a considerable period of residence in the Commonwealth. It is clear, however, that a wide discretion granted to the executive to order deportations is definitely viewed with disfavour by the Court, and that it will by no means be easy to provide it by legislation within the terms of the Constitution, while the suggestion to amend the Constitution to strengthen the hands of the Government is not one likely, judging from past experience in the Commonwealth, to prove successful. The decision of the Court incidentally raises the interesting problem of the possibility of opposing a successful resistance to the claims for wrongful arrest naturally now brought by the persons concerned, whose case rests on the ground that the whole of the proceedings taken against them were based on provisions of law held to be *ultra vires*. Further, it justifies *ex post facto* the refusal of the Labour Government of New South Wales to afford any assistance through its police force to the Commonwealth Government in serving summonses or otherwise acting under the legislation of 1925, an attitude which the Commonwealth Government countered by securing the passage of special legislation authorizing it to appoint peace officers of its own.

Imperial Terminology.—Mr. Swift MacNeill[1] has recently protested strongly against the inexactitude of the style of United Kingdom of Great Britain and Ireland, and his protest has in some quarters seemingly been deemed to extend to the use of the term United Kingdom. There is, of course, no validity in this point of view; the term United Kingdom is primarily applicable to the United Kingdom of Great Britain created by the Act of Union between England and Scotland, and the addition of Ireland was the only change effected by the Act, which destroyed for a time the separate existence of Ireland. There is, of course, no doubt that the correct terminology in point of fact since the Free State became a Dominion is rather the United Kingdom of Great Britain and Northern Ireland, inasmuch as, despite its considerable local autonomy, Northern Ireland is still vitally a part of the United Kingdom. But the question of formal change is not simple; it would immediately affect the royal title, and it is not clear that it is desirable to bisect Ireland in this way by specifying Northern Ireland and leaving the Free State to be included in the generic terms British Dominions beyond the Seas. What, however, might be done is the adoption by the Foreign Office of some systematic mode of procedure as regards nomenclature; there seems to be no valid reason for using Great Britain as a compendious mode of describing either the British Empire as a whole or the United Kingdom as it at present exists. It is interesting to note that very tardily Western Australia has banished[2] the titles of Colonial Treasurer and Colonial Secretary from her statute book.

[1] *The Times*, October 14, 1925.

[2] The Ministers' Titles' Act, 1925.

NOTES.

The Cabinet and the Attorney-General.—General interest attaches to the controversy in England over the relation of the Attorney-General to the Cabinet, for the problem presents itself in a more or less analogous form in those parts of the Empire where criminal procedure is based largely on English precedent. One essential point has been justly insisted on by Sir Maurice Amos [1]; the primary issue is not whether the Attorney-General ought to be eligible for membership of the Cabinet, but whether political intervention in criminal justice is in itself justifiable. Posed in this way, there can really be no doubt as to the decision; the State is not bound to seek to punish every person who may in his attacks on it trespass beyond the limits of criticism which every free Constitution allows. It is bound to proceed against those who deliberately seek to overthrow it, but there are excellent grounds for holding that a strong State, resting on the free will of the great majority of its citizens, can quite properly permit to pass unnoticed actions which a weaker Government might feel it necessary to seek to punish as seditious. Or, apart from politics, can it seriously be disputed that it must rest with the Government of the day to decide how far, for instance, a regulation requiring ships to carry wireless operators shall be enforced by penal proceedings at a time when the operators are endeavouring by a strike to compel shipowners to concede wages deemed uneconomic? A mechanical application of the law in such cases would merely result in devices being sought by the Courts to evade results which they deemed inequitable, with the consequence of uncertainty and unfairness in administration. This consideration, however, does not decide the issue of the relation of the Cabinet to the Attorney-General, and *a priori* it is quite conceivable that the most logical arrangement would be for Governments to be aided only by permanent law officers who would advise them on legal matters and take their instructions on all questions of policy. But Governments must be prepared to defend their actions in Parliament, and considerations of the advantages of the division of labour weigh strongly in favour of the inclusion in a Government of a member with the duty of advising on legal questions, including the exercise of the prerogative of mercy. In England the Attorney-General is denied any control in regard to that prerogative as a necessary result of the fact that he is expected to play not merely the part of a Minister of Justice, but also of an active participant in criminal prosecutions, and a good case might be made out both on theoretical as

[1] *The Times*, November 28, 1925.

well as on practical grounds in favour of a new delimitation of the functions of the Attorney-General.

The relation of the Attorney-General to the Cabinet depends really on the nature of the functions to be exercised by him. If he were essentially the adviser of the Government on all legal issues, he would be practically an indispensable member of any Cabinet, for he would have the necessary time to acquire that full knowledge of matters of cabinet importance which the average member of a Cabinet finds it difficult to attain. In existing circumstances the really valid objection to an Attorney-General forming part of a Cabinet is simply that he cannot have the time necessary to perform his cabinet work with complete efficiency, and it is a sound principle that the Cabinet should be confined to such ministers as are capable of playing a full part in its deliberations. As far as exercise of discretion in regard to judicial proceedings is concerned, it cannot logically be contended that it is preferable for the Attorney-General to receive instructions from the Cabinet rather than to take part in its deliberations; common sense dictates that he must be consulted, and it is impossible to see how it is better that he should be denied cabinet membership on this score.

Dominion Practice.—The usage in the Dominions has definitely decided in favour of the principle that the Attorney-General, or as he is more suitably called in some cases, the Minister of Justice, should leave to others the general control of criminal prosecutions, and should concentrate on the work of giving legal advice to the Cabinet of which he is as a matter of course a member and to the departments of Government, while he advises on the administration of the prerogative of mercy. In the Crown Colonies, where greater activity in prosecutions falls on the Attorney-General, who is a member of the Executive Council of the Governor, the latter has personal responsibility in matters of the exercise of the prerogative of mercy. In the Dominions and the Colonies, as in England, cases occur in which it is difficult not to feel that the legal views of Attorneys-General have been influenced—doubtless unconsciously—by regard to the political advantage of holding that some course was within the limits of the existing law; it is difficult to explain otherwise instances such as the advice given to His Majesty's Government[1] that the arrest and deportation of Art O'Brien and others was legal, or that tendered to the Governor of Tasmania when he was advised he should assent to a bill passed only by one House of Parliament.[2] But it would be absurd to expect infallibility, and the system of independent Courts affords adequate security to British subjects for redress in respect of illegal actions.

A. Berriedale Keith.

Codification of International Law.—The demand for the codification of public international law has been intensified by the events of the late war

[1] See this *Journal*, Third Series, vol. v, pt. iv, pp. 275 ff.

[2] *Ibid.*, vol. vii, pt. iv, pp. 205 ff.

and has been manifested by proposals emanating from highly responsible international conferences and bodies of jurists. In the October number of the *American Journal of International Law* Senator Elihu Root, and in the October number of the *American Bar Association Journal* the Hon. Geo. W. Wickersham, have summarized the present position of this important question. Both these eminent jurists discuss the situation from the same standpoint. They clearly distinguish codification proper, *i.e.* codification of existing law, of which the works of Dudley Field, Bluntschli and Fiore are outstanding examples, from codification of new law, or of existing law and new law combined, such as The Hague Conventions, the Declaration of London, the Treaty of Washington and other similar international conventions. They both recognize that codification need not necessarily precede an International Court, since a substantive law is already in existence. As Baron Korff pointed out shortly before his death, international law is coeval with civilization. It is a necessary consequence of any and every civilization, and is to be found in the earliest civilizations of every quarter of the globe of which we have any knowledge. They both agree that codification, in either sense of the term, by official conferences is useless. Partly, says Senator Root, because official delegates have not the time, partly because a large number of their membership will naturally be composed of men of affairs who have not the learning or the aptitude for scientific research necessary for laying the foundation for agreement, and partly because the freedom and frankness of discussion, and mutual concession for the reconciliation of views is difficult to secure among official delegates acting under instructions, and obliged to get governmental authority for every position they state. Both, therefore, agree that official action must be preceded by the work of private individuals and organizations, and both agree that the work consequently must be of a piecemeal character, and that the process must be gradual and the progress correspondingly slow.

Senator Root was one of The Hague Advisory Committee of Jurists which framed the statute for the Permanent Court of International Justice, and which further recommended to the League of Nations the institution of international conferences for the following purposes: (1) to restate the established rules of international law, especially, and in the first instance in the fields affected by the events of the recent war; (2) to formulate and agree upon amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war, and the change in the conditions of international life and intercourse which have followed the war; (3) to endeavour to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore; (4) to consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law should be declared and accepted.

And the Committee further recommended that the Institute of

International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association and the Iberian Institute of Comparative Law be invited to prepare, with such conference or collaboration *inter sese* as they may deem useful, projects for the work of the conference, to be submitted beforehand to the several Governments, and laid before the conference for its consideration and such actions as it find suitable.

This recommendation did not immediately appeal to the League, although it did in 1921 invite the opinion of the International Law Association upon the question of Lost and Stolen Securities. But in 1924 the Assembly requested the Council to appoint a Committee to prepare a provisional list of subjects sufficiently ripe for codification and the procedure to be followed. This Committee has been set up and has invited the bodies above mentioned to collaborate with it. The International Law Association has already responded by presenting an Interim Report. Meanwhile, in 1923 the Fifth International Conference of American States appointed a Commission of Jurists to prepare a draft code for discussion at Rio de Janeiro in 1925, and upon the request of the Pan-American Union a code of the laws of peace was prepared by the American Institute, and presented to the Commission of Jurists at Rio. This code is based mainly on what is termed "American International Law," and Mr. Wickersham shares the apprehension which I expressed at Buenos Aires in 1922, that it may tend to create a separate code "framed with a view to the creation of a separate and distinct jurisprudence among the republics of America from that applicable to all the civilized nations of the earth." It would, as Mr. Wickersham says, "tend to a confusion in the principles of a law whose foundations lie in the common consent of all civilized Powers." It might, as I said, even lead to armed conflict.

Since the war the Institute of International Law has effected little of a practical character, and has so far failed to live up to its previous reputation. On the other hand, the International Law Association upon the conclusion of peace immediately renewed its activities. During the war its Maritime Law Committee had prepared a code of the Laws of War at Sea which was presented to the Portsmouth Conference of 1920, postponed from the previous year owing to the railway strike. Proposals were also submitted to regulate the treatment of prisoners of war. A Committee, with Lord Blanesburgh as Chairman, was appointed to draft regulations, which were passed by The Hague Conference of the Association in 1921, and adopted with slight verbal alterations by the Imperial Committee of Defence, by India and some of the Dominions. Regulations for the treatment of civilian prisoners of war, also drafted by the same Committee, were adopted by the Stockholm Conference in 1924, and are now before the Imperial Committee of Defence. Both these will doubtless eventually be submitted to an International Conference of the Powers. Regulations for the conduct of

aircraft in peace and war, and for the use and manufacture of poison gas were adopted by the Conferences of Buenos Aires in 1922, and of Stockholm in 1924, whilst in the domain of private international law the rules of Bills of Lading were adopted at The Hague Conference 1922, universally accepted by the commercial world, and made statutory by Great Britain and the Commonwealth of Australia. At the Stockholm Conference the York-Antwerp Rules of General Average were revised and almost universally adopted by the interests concerned, and a model statute on Nationality and Naturalization adopted. My draft Statute for a Permanent International Criminal Court was also submitted to this Conference. Mr. Wickersham, therefore, is mistaken in stating that the Association has made no serious attempt to codify International Law, which its original title, "The Association for the Reform and Codification of International Law," suggested. No doubt before the war, the Association, as he states, occupied itself in popularizing such questions by public discussion and bringing to bear upon their solution the suggestion of practical men and formulating suggestions likely to have practical effect. This is still one of its most important activities, but as indicated above it is still true also to its original objective. With a membership of nearly 2,000, including not only the leading jurists from every country in the world, but also the leaders of almost every branch of commerce, naval and military officers of high distinction, statesmen, diplomats, colonial governors and publicists, it is able from its own ranks to appoint to its numerous committees experts in almost every aspect of the subjects submitted for examination. Thus it is a singularly fit body to take part in the gradual codification of international law.

As Senator Root said in 1915 : "The process of codification, step by step, subject by subject, point by point, must begin with the intellectual labour of private individuals and it must be completed by the acceptance of Governments."

The substance of the resolution of the Assembly of the League seems to Mr. Wickersham to indicate a line of cleavage between the practical scheme of gradual codification by international agreements, and the production of a comprehensive Code of International Law, similar in scope to the Code Napoléon. If the latter is really the object of the League I agree with Mr. Wickersham that it is doomed to failure. Neither the League of Nations, nor any other official body is competent to perform such a task. The function of the League is to be the instrument by which the work of others may be incorporated in international conventions acceptable to the whole world. As Dean Pound reminds us, law is found, not made. When the common purpose of each group or interest is ascertained, regulations expressing the general will may be framed. It is the function of jurists and unofficial organizations to ascertain these common purposes, and to frame regulations for their expression. International law is nothing else than the expression of the common purpose of the society of nations.

On the other hand, Senator Root regards these various proceedings on both sides of the Atlantic as not exclusive or competitive. On the contrary, they are contributory to a common end. They exhibit a general sense that the time has come when there should be no further delay in the necessary preparation for a general international conference which shall make more certain and comprehensive the body of law by which international conduct is to be ruled. But Senator Root would be the first to admit that this result can only be obtained by a succession of conferences, preceded by years of labour by the learned societies to which he looks for the spade-work.

This is the view of Mr. Wickersham. The law of our day, he says, citing the words of Judge Cardozo, faces a twofold need: "The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that mediates between the conflicting claims of stability and progress, and supplies a principle of growth. The first need is deeply felt and widely acknowledged. . . . The second, though less generally appreciated, is emerging year by year to fuller recognition."

Both these needs, declares Mr. Wickersham, exist in the field of international law, as well as in that of municipal law, but in the former there is less discernible a philosophy which is to mediate between conflicting claims of stability and progress and supply a principle of growth. The latter may, he thinks, be found in the widening principles of democracy among nations, and in the enhanced recognition of the sovereignty of States, great and small alike. One may be permitted to doubt this. To my mind the greatest obstacle to the principle of growth in municipal and international law alike is the modern theory of absolute sovereignty. In my view the solution lies in the principle of the sovereignty of law. Just as the rule of law prevails, or should prevail, within the State, so it should prevail within the family of nations. We are returning to the mediæval conception of a law superior to any one man or body of men. This law was termed reason. In the coming era of juristic activity we must, as Dean Pound declares, fall back upon general considerations of what is reasonable.

HUGH H. L. BELLOT.

Registration of Title to Land in New Zealand.—Mr. C. E. Nalder, the Registrar-General of Land, New Zealand, contributes the following note on the Land Transfer (Compulsory Registration of Titles) Act, 1924 (No. 32):

New Zealand was constituted a self-governing Colony by Letters Patent, dated November 16, 1840, under the Great Seal of the United Kingdom of Great Britain and Ireland, and power to make laws for the peace, order and good government of the Colony was given to the Governor and Legislative Council by the said Letters Patent. Little time

was lost by the new Legislature in framing a law for the registration of deeds affecting the titles to land, for on December 28, 1841, an Ordinance, entitled, "An Ordinance to provide for the Registration of Deeds and Instruments affecting Real Property," was made. The Ordinance provided for the registration of deeds, contracts, wills and memorials affecting the title to lands. Under its provisions deeds *might* be registered in the manner prescribed; that is to say, registration was permissive, not compulsory. In effect, however, registration was practically compulsory by reason of the provision in the Ordinance that every deed or contract authorized to be registered, but not registered, should be void as against any person claiming the same land for valuable consideration under any subsequent deed or contract duly registered. Several amendments of this Ordinance were subsequently made, and it was finally repealed by the Deeds Registration Act, 1868, the principle of which Act, however, was the same as that of the Ordinance. The Act continued on the statute-book till the year 1908, practically without amendment, when it was re-enacted, upon the consolidation of all the public statutes of New Zealand, under the title of "The Deeds Registration Act, 1908," and is still in force.

These enactments provided for the registration of instruments of title as distinguished from the registration of titles themselves. Instruments are registered under the heading of the section number or other description of the particular parcel of land affected by the instrument, but the Registry Office is not concerned with the accuracy of the instruments or their sufficiency for the purposes intended to be effectuated by them.

In the year 1857, the late Sir Richard (then Mr. Richard) Torrens induced the Legislature of South Australia to pass an Act providing for the registration of title as opposed to the registration of instruments of title. This principle of registration of title, or as it may be more accurately expressed, title by registration, has since been adopted in the United Kingdom and in other parts of the British Empire, there being within the Empire altogether twenty-eight separate systems of registration of title, each based on a separate set of statutes, not differing in principle. As well as in the United Kingdom the system is in force in New Zealand, in all the Australian States, in six provinces and the territories of the Dominion of Canada, and in a number of Crown colonies and protectorates.

New Zealand adopted the system by the passing of "The Land Transfer Act, 1870." This Act was amended from time to time, and was repealed by "The Land Transfer Act, 1885," which was mainly a consolidation of the repealed Act and its amendments. The Act of 1885 with some minor amendments was consolidated by "The Land Transfer Act, 1908," and its provisions, with certain slight amendments, were afterwards enacted as "The Land Transfer Act, 1915," which is still in force. The original Act of 1870, and also the subsequent ones,

provided that lands alienated by the Crown after the date of the coming into operation of the Act should be subject to the provisions of the Act, and that lands alienated by the Crown prior to that date might be brought under the operation of the Act upon the application of the owner. Under the system an owner's title to land is conclusively evidenced by a Certificate of Title issued by the Registrar.

Thus, since the passing of the 1870 Act, the two systems of registration of instruments of title and registered title guaranteed and evidenced by a certificate of the Registrar have subsisted side by side.

At the present time somewhere about 80 per cent. of the number of holdings of alienated land is subject to the provisions of the Land Transfer Act and the remaining 20 per cent. is still subject to the provisions of the Deeds Registration Act. A very considerable number of holdings subject to the Deeds Registration Act are brought under the Land Transfer Act annually, upon the applications made by the owners; but notwithstanding this, the number of holdings not subject to the Land Transfer Act has increased, by the subdivision of holdings, at the rate of about 4 per cent. per annum.

The Land Transfer (Compulsory Registration of Titles) Act, 1924, has for its object the bringing under the provisions of the Land Transfer Act, 1915, of all land alienated by the Crown and not already under the provisions of that Act, except lands held by aboriginal natives of New Zealand under their customs and usages.

The Registrars in charge of the various registration districts constituted under the Land Transfer Act, 1915, are directed by the new Act to make what will be, in effect, an official examination of all the titles to land not subject to the Land Transfer Act, and to issue Certificates of Title to the persons entitled to estates of freehold therein. Such Certificates of Title will, in cases where the Registrar finds that the title is free from any defect or doubt, be ordinary Certificates of Title, under which the holder's title is fully guaranteed by the Crown. If, however, it appears that the owner's title is defective or doubtful, it is the duty of the Registrar to issue what is termed a Limited Certificate of Title, the effect of which will be that the owner's title is guaranteed, except as to the specific defects or doubts that may be found by the Registrar to exist. It is open to the owner to have the defects or doubts remedied or removed, and he will then be entitled to receive a Certificate of Title fully guaranteed. Owners or claimants of interests in land other than registered proprietors are given twelve years in which to prove their titles or to substantiate their claims if such claims or interests have been excepted from the guarantee, and if they do not do so, then at the expiration of the twelve years the registered proprietor will be entitled to an ordinary fully guaranteed Certificate of Title, upon his proving to the satisfaction of the Registrar merely that he is in possession of the land comprised in his Certificate of Title.

As soon as a Certificate of Title, whether fully guaranteed or limited, has been issued for any particular parcel of land it will no longer be

necessary for conveyancers to examine the various deeds which have affected the title. All they will need to do will be to search the Certificate of Title and the Registrar's minutes setting forth the defects, if any.

Syrians and Palestinians in Egypt.—The November number of *L'Égypte Contemporaine* contains an interesting note by M. Assabghy of the Egyptian Foreign Office with reference to the present position of Syrians in Egypt. Attention has previously been drawn in this *Journal* [1] to the curious and doubtful situation in which Syrians, Palestinians and Ottomans are placed owing to the separation of Egypt from Turkey, and to the formation of the new Mandated States. Prior to the war there was no doubt that all Ottomans in Egypt were justiciable in their relation with Egyptians before the Egyptian Native Courts. They were not "foreigners," and the Mixed Courts have jurisdiction only between natives and foreigners. On the other hand, the Mixed Courts have for many years interpreted the term "foreigners" in the Decree of the Organization of Mixed Suits (Art. 9) as including all non-Ottomans, even though natives of a State which had not adhered to the Agreement instituting the Mixed Courts. The separation of Egypt from Turkey appeared, therefore, to involve the inclusion of Ottomans as also of Syrians, Palestinians, etc., within the term "foreigners" so as to make them justiciable before the Mixed Courts in their relations with Egyptians. This conclusion seems to have been sometimes accepted, and sometimes rejected. M. Assabghy cites some of the relevant cases. Some doubts might perhaps arise before the Treaty of Lausanne, and before the coming into operation of the Mandates in Syria and Palestine, though in my opinion the doubts were not well founded. Now, however, that the new regime in Turkey, Syria and Palestine is internationally recognized, the fact that Ottomans, Syrians and Palestinians are foreigners in Egypt must be accepted. This is even more certainly the case since the promulgation of separate laws of nationality in Syria and Palestine.

A further difficulty, however, arises. Before the separation of Egypt from Turkey, the Turkish Law of Nationality applied in Egypt. No new Egyptian Law of Nationality has been enacted since the separation and the conditions upon which Egyptian nationality can be obtained are obscure. The rules laid down in the imperfect Ottoman Law of Nationality of 1869, previously in force, have by many been assumed to be still applicable; but this view does not seem to be favoured by M. Assabghy. In any case, the situation is doubtful. The Treaty of Lausanne gives to persons of Syrian and Palestinian origin established in Egypt (*inter alios*) a right to opt for the nationality of their homeland within a period of two years from the date at which the Treaty came into force. An agreement upon the subject between Egypt and the State of origin is a necessary precaution in order that dispute may be avoided. But in the absence of any law defining the conditions for

[1] See *Journal of Comparative Legislation*, Third Series, vol. vi., pp. 262, 265-6.

acquisition of Egyptian nationality, such an agreement was difficult. How can a right to opt be exercised till a choice between two lines of action is given? Until Egypt has stated the conditions under which a person of Syrian origin established in Egypt may be recognized as Egyptian, such a person has no choice. Meanwhile, the period of two years was running. The immediate difficulty has been met by a *modus vivendi* between the French and Egyptian Governments, the terms of which are set out by M. Assabghy. In effect the right to opt is reserved until the enactment of a new law of nationality in Egypt. Meanwhile Syrians who come to Egypt after the date of the *modus vivendi* (March 16, 1925) are placed under French diplomatic protection. As regards these latter no question can now arise, but that they are " foreigners " for the purpose of mixed jurisdiction. M. Assabghy, indeed, quotes a recent decision of the Mixed Courts to the effect that a Palestinian in the like position is a " foreigner."

But though " foreigners," and under the diplomatic protection of France and England respectively, Syrians and Palestinians in Egypt do not appear to be entitled to the benefit of the Capitulations.

F. M. GOADBY.

German Insurance Code.—The International Labour Office has just published a full translation[1] of the German Insurance Code (*Reichsversicherungsordnung*) in the amended and consolidated form issued on December 15, 1924. This immense code was first compiled in 1911 out of the older laws dealing respectively with insurance against sickness, accidents, and old age or permanent invalidity. It was, of necessity, so frequently amended, chiefly by emergency orders, during the period of economic confusion after the war, that it became practically incomprehensible. The official consolidation will, therefore, be very welcome to students of social insurance, who will also be grateful to the International Labour Office for providing an excellent translation. The Code was amended again by an Act of January 1925, which is now also available in the Legislative Series (Brochure edition, 1925, Ger. 4).

S. SANGER.

The Federal Courts of the United States.—The *Harvard Law Review*, beginning in its issue for June 1925, is publishing a series of studies of the Federal Jurisdiction of the United States which promise to be of considerable interest to constitutional lawyers. The occasion is opportune; for the so-called " Judges Bill," which became law in February 1925, marks a new stage in the history of the Federal Judiciary, a stage even more distinct than that which was indicated either by the Civil War or by the Rogers Act of 1891.

As is well known, the United States Constitution, inspired by the observations of Montesquieu, provided for the establishment of a Federal

[1] Legislation Series, 1924, Ger. 10; P. S. King & Sons, 6*s*.

Court or system of Courts independent of both Legislature and Executive. It specified two kinds of cases which should come before this Federal Judiciary: the first group determined by the nature of the questions involved; the second group determined by the nature of the parties to the suit. Having, however, laid down general principles, it left to Congress the task of deciding upon details. Congress, accordingly, after much debate, passed the famous Act of September 1789, which set up (1) thirteen District Courts; (2) three Circuit Courts; and (3) one Supreme Court.

The subsequent history of this system of Federal Courts revolves confusedly and tumultuously round three points. First, there is a conflict between the Federal system as a whole and the State Courts —a phase of the larger struggle between the Nationalist and the Separatist parties in the Union. Secondly, within the Federal system, there is a constant tussle between the District Courts and the Supreme Court, a tussle raging round the control of the intermediate Circuit Courts. Finally, there is the problem of the enormous and unmanageable growth of business, due on the one hand to the increase in the number of Constituent States in the Union, and on the other hand to the immense economic development of America. Thus, in 1890, the cases pending in District and Circuit Courts numbered 54,194, while the Supreme Court had to face 1,816!

It was this awful congestion, especially in the Supreme Court, which necessitated the Rogers Act of 1891, instituting Intermediate Courts of Appeal. Hence up to the present time the Federal Judiciary, as reorganized and extended, has consisted of (1) eighty-three District Courts, (2) nine Circuit Courts, (3) nine Intermediate Courts of Appeal, and (4) the one Supreme Court.

This is as far as the *Harvard Law Review* takes us at the moment. It promises in its next issue to describe the causes which necessitated further legislation in Congress respecting the Federal Courts and to explain the nature of the "drastic redistribution of powers" effected by the Act of February 1925.

F. J. C. Hearnshaw.

Companies Empowering Act (1924) New Zealand.—The Companies Empowering Act (1924, No. 52), enables a limited liability company, if it so wishes, and to the extent it wishes, to take those in its employ into partnership, both as regards profits and control, without capital contribution. This is effected by the device of "Labour Shares," issued purely by virtue of service contribution, as "capital shares" are issued by virtue of capital contribution. The incidents of share-holding, in regard both to profits and voting power, hitherto confined to capital shares, may now be exercised by the holders of "Labour Shares." For the first time in any British community, legislative recognition is given to the human status in industry. A new principle has been introduced into

our Company Law, for hitherto the sole basis of company organization has been capital contribution. Membership of a company may now in New Zealand be expressed in terms of service, whereas it could formerly be expressed only in terms of pounds sterling.

The intent and purpose of the Act as conceived by its author, Mr. H. Valder, of Hamilton, New Zealand, was well expressed in a preamble to the first draft (not included in the Act), suggested by Mr. F. G. Dalziell, Barrister, of Wellington:

Whereas it is advisable to give encouragement and facilities to those employers who may wish to evolve some workable plan whereby the employees in industry may become interested in its efficient and profitable operation. And whereas the existing company legislation contemplates that the profits and management of a company will belong wholly to those who subscribe its capital. And whereas it is expedient so to amend such legislation that by agreement between employers and employees provision may be made for the issue of shares in a company to those who give only personal service to it whereby their participation in the profits and management may be conveniently arranged.

Sections 3 and 5 governing the issue of "Labour Shares" are as follows:

S. 3. With respect to "Labour Shares" issued as aforesaid, the following special provisions shall apply:

(*a*) They shall have no nominal value and shall not form part of the capital of the company.

(*b*) They shall be numbered consecutively, commencing with the number one.

(*c*) They shall not be transferable, save in accordance with the provisions (if any), in that behalf of the regulations of the company.

(*d*) They shall entitle the holders thereof to attend and vote at meetings of shareholders, and to share in the profits of the company, or in its assets in the event of its being wound up to such extent and in such manner as may be determined by the Memorandum or Articles of Association of the Company.

(*e*) Save as may be expressly provided herein or by the Memorandum or Articles of Association of the Company, the holders of labour shares shall have and enjoy all the privileges of other shareholders.

S. 5. If the holder of any labour shares ceases to be employed in the service of the company (whether by reason of death or otherwise), he shall be deemed to have surrendered his shares, and in such case there shall be payable to him or his legal personal representatives as the case may be, either in cash or in capital shares, the value of those shares computed in accordance with the regulations of the company.

The Act is, as described, purely enabling and the extent to which the advantages contemplated are conceded is left to the regulations of the company concerned. Mr. Valder believes that, after adoption of the Act in the manner prescribed, individual companies are likely to experiment with special employees or classes of employees before carrying its underlying principles to their logical conclusion. He draws a clear and single line of demarcation in industry between the contributors of

capital and the contributors of service. The former is " the money-lender," the latter " the worker." The " money-lender," in Mr. Valder's view, should receive the market rate of interest with a risk-rate (to insure against loss of capital); the " worker " (including General Manager and Office Boy) should, on a basis of service, share the surplus profit. Money-lenders who also give service occupy a dual status and should receive the advantages attaching to both qualifications. The payment of a predetermined rate of interest on capital, although the Act does not in terms refer to the matter, is of the essence of the industrial experiment which is the Act's main objective. The argument commonly urged by the owners of capital, that capital should reap the unlimited rewards of industry because " labour " is unable to share the losses, is met by Mr. Valder, with the assertion that " labour " does take the loss of its full share, through unemployment.

The " Labour Share " as a means of effecting the purposes aimed at is undoubtedly an ingenious and extremely simple expedient. Without " par value," its issue does not disturb the existing arrangement of share capital. It may have attached to it any voting power—as for election of directors—which may be decided on, and the amount of profit divided by the number of labour shares would give the unit per share in the distribution of profit. It may be remarked that the business details of the scheme were thoroughly worked out by Mr. Valder in a subsidiary company before he began on the task of promoting legislation.

It will be noted that all the profits of a year (if any) can seldom be withdrawn from a business and in most cases a substantial part of the profit must be carried to reserve. In Mr. Valder's opinion the interest of the labour shareholders which is needed for and is kept in the business should be payable to such shareholders in the form of fully paid up capital shares. Though the official Labour Parties are at present looking elsewhere for ultimate solutions of their difficulties, it may be assumed that employees to whom " Labour Shares " are issued will not be dissatisfied. They have nothing to lose, for the rates fixed under the Industrial Conciliation and Arbitration Act will not be affected, and they have much to gain.

Those who consider the Act as a piece of legal draftsmanship will note that s. 4 is clearly an interpolation. It has obviously been inserted as a concession to political objections, and it is very difficult on general grounds to explain its utility; moreover, it creates some difficulties which may conceivably require judicial interpretation.

F. A. DE LA MARE.[1]

A very interesting experimental Act has recently been passed by the New Zealand Parliament. It is one more attempt to put the principles

[1] A Solicitor of the Supreme Court of New Zealand, who has been associated with Mr. Valder in advocating the scheme, which has been recognized by the Legislature in the Companies Empowering Act.

of co-partnership and profit-sharing between capital and labour into a workable legal form. The Act is, we understand, based on the scheme of Mr. H. Valder, of Hamilton, N.Z.; and is not the outcome of mere theory, but the result of practical experience gained by that gentleman in his own extensive and responsible business connexions. The Act is well worth the attention of the Legislatures of other countries.

The first interesting and valuable point is that the Act is so drafted that it is to be read as part of the general Companies Act which was passed in New Zealand (as in Great Britain), in 1908. This is a very wise procedure, both as a simplification in law and because it tends to contradict any suggestion of freak legislation.

The Act is very short, and its essential section is one enabling any registered company to provide in its original memorandum of association (or to amend its memorandum subsequently) for the issue of special Labour Shares to any persons employed by the company. The object is to make these shares a basis on which to estimate the rights in co-management and profit-sharing of the working members of the staff as against the shareholders.

It is enacted that these labour shares "shall have no nominal value and shall not form part of the capital of the company." They are, in fact, mere counters whose value is to be determined by the terms of the memorandum or articles of association.

But there is one right which the Act itself gives to the holders of the labour shares; *i.e.* it entitles them to "attend and vote at meetings of shareholders and to share in the profits of the company, or in its assets in the event of its being wound up." But, apparently, the number of votes and the amount of profits can be fixed by the memorandum or articles of association, and it is only when these are silent that the labour shareholders are to "have and enjoy all the privileges of other shareholders." It is a little difficult to see how these privileges can be measured until the labour shares are given a value by the articles or in some other way; and since they are expressly excluded from being part of the capital of the company, they will not carry voting rights until a special regulation of the company defines such rights.

However, the intention seems to be that the privileges of labour shareholders shall be fully defined in the memorandum or articles of the company. It is obvious that we here have a clever plan which will enable all sorts of experiments to be carried out along the lines of co-partnership, co-management and profit-sharing. There is a great advantage in this elasticity, and there is, of course, a further advantage in making the scheme a voluntary one, and not forcing it on unwilling industrialists, whether on the capitalists' or wage-earners' side.

By this Act it is possible to vary the share in the management and in the profits in any degree between a mere "insight" into the books and the results, or between a share in the surplus after distribution of a specified amount to the non-working shareholders up to a controlling

interest in the management and a dominant interest in the profits. Within the terms of this simple Act, indeed, it is possible to try innumerable social experiments, without overturning the basis of industry by rash, theoretical national compulsory rules.

One advantage of making the labour shares distinct from the capita shares is that after death or dismissal or resignation of the member holding them the shares do not necessarily remain as a dead weight, added to the other non-working shareholders' power. The current value of the shares at the time when their holder ceases to possess them will be paid to his personal representatives in cash, although the company is given an option of paying in ordinary shares.

There is, finally, another useful section which makes it compulsory to submit every share under this Act to the examination of the Court of Arbitration erected under the Industrial Conciliation and Arbitration Act of 1908; and the scheme will not be held in force until this Court "certifies that in its opinion the scheme would be favourable to the general body of the workers."

It may be mentioned that Mr. Valder, the father of this Act, has claimed that the Act has accomplished (along independent lines of thought) a proposal outlined in this *Journal of Comparative Legislation*,[1] by the present writer in 1920. The same idea has also been handled in an interesting manner in the Bill of last session brought forward by Mr. Peto and others in the British House of Commons. The Labour Members, too taken up by political and party issues to attend to economic interest, did not give it the consideration it deserved.

G. R. Stirling Taylor.

The Problem of Grotius.—What sort of man was Grotius? Was he a philosophical jurist or a plain practising lawyer? Of which of these men was the *De Jure Belli* the product and expression? The current issue of the *Revue de Droit International* (Nos. 4 and 5), which especially marks the tercentenary of the *De Jure Belli*, suggests these questions. There are three articles devoted to Grotius—the *Hommage à Grotius*, of Baron Descamps; *La Genèse du Traité du Droit de la Guerre et de la Paix*, of Mr. James Brown Scott; and *Le rôle de Grotius dans le développement scientifique du droit international*, of Professor V. E. Hrabar, of Dorpat. Of these, the two latter strike individual notes of arresting contrast.

Mr. Scott, with a wealth of material in support, holds the view that Grotius was essentially a practical lawyer and man of affairs, only incidentally a theorist, and that the *De Jure Belli* itself is, in its matter design and method, essentially characteristic of such an author. Grotius himself was a practising lawyer of great reputation. His work was "born in a Court of Justice," and, probably, would not have seen the light of day at all if its author had not been a practical professional man. "In Grotius we have to do with a practical man, occupied with a subject to

[1] Third Series, vol. ii, pt. 3, p. 206.

which he had devoted profound study, long reflection, and the experience of his professional activity. It is because of these qualities and of this preparation that the treatise has retained the attention of the world. It is not a hypothetical dissertation, even though it may be replete with theory." Nor is it a philosophical dissertation. It is the development of a professional memoir, enriched by many years of experience.

Our minds being thus settled as to this point, we turn to the article of Professor Hrabar. Here again we have a writer without any prejudices and perfectly equipped with relevant learning. But to what a different Grotius are we presented! So far from being the natural devotee of legal practice, he is not only one whose interest in the law of the practitioner is of the slightest, but also one ever ready to ignore it and eager and emphatic in depreciating it and its practitioners. With such law he had no intellectual sympathy. On the contrary, he had a decided leaning towards the theory or philosophy of law. "When we find Grotius praising the study of the law, that praise does not contemplate the law of the Law Courts; the profession of advocate or judge repelled him." The *De Jure Belli* is, in short, an effort, based on theoretical considerations, to destroy the many complicated systems of positive law and replace them with a philosophical system of natural law. And thus we find, perhaps, that our mind is not settled at all.

The fact is, no doubt, that there is no solution to the problem discussed in these two articles. May it not rather be that Grotius and the *De Jure Belli* are really beyond the operation of perfect analysis, each possessing, rather, that subtle and always elusive characteristic which has ever been the mark of supreme genius and its product? All lovers of truth and single-minded searchers thereafter can find in him and his work that which is to them the truth. The positive jurist will find the lawyer and the law of the market-place and the Court, while the philosopher will as readily discover the professor and the law of the academy. And neither will be in error. And so, for centuries, Grotius and his great work have, rightly and by necessity, attracted the sympathy, and commanded the adherence, of a whole world.

W. S. M. Knight.

M. Thomas's Visit to South America.—The Director of the International Labour Office, M. Albert Thomas, took a trip last year to South America, with the object of arousing public interest in the International Labour Organization and of galvanizing the four Republics visited to greater activity in the ratifying of international labour conventions. His report to the Governing Body on his journey was published in last December's issue of the *International Labour Review*. He succeeded in bringing back with him to Geneva Chile's ratifications of no less than eight draft conventions, the first from a South American country. The President of Chile even issued the necessary decrees as a matter of urgency, without awaiting the parliamentary sanction usually

required. The Republic of Uruguay, which prides itself on having the most advanced social legislation in South America, seems also to be the only one of the Republics with a satisfactory system of inspection, though Chile is taking steps in that direction. Although Uruguay has not actually ratified any of the draft conventions, most of them are receiving serious consideration, and progress was reported to the Director by a letter handed to him on his arrival at Montevideo. Several Government Departments or representative committees have recently been created in the various States for the purpose of keeping in touch with the work of the International Labour Organization. The inadequacy of industrial organization in most of the Republics and the communist aloofness of the trade unions in some cases lead to difficulties in selecting the representative members on the South American delegations to the annual Conferences. These difficulties, together with the heavy expense of sending full delegations so far each year, have resulted in the South American countries being often represented by only partial delegations. The opportunity was taken of impressing upon the various Governments the constitutional importance of sending complete delegations. Another constitutional point was also cleared up in Brazil, where the Government had been under the mistaken belief that the absence of representation at a Conference exonerated a member of the Organization from the duty of submitting the draft conventions and recommendations of such Conference to the competent legislative authorities. Reference is made in the Report to steps taken by Brazil and Uruguay towards the ratification of the proposed amendment of Art. 393 of the Treaty of Versailles relating to the composition of the Governing Body.

S. SANGER.

Administration of Justice.—It is officially announced that in view of the provisions of Part II of the Administration of Justice Act, 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any part of His Majesty's Dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends, the Legislature of Papua has made reciprocal provision for the enforcement therein of judgments obtained in the High Court in England, the Court of Session in Scotland and the High Court in Ireland, and an Order in Council has accordingly been issued extending Part II of the Act to the above mentioned Territory.

The operation of the Order in Council is confined to England, Scotland and Northern Ireland, and similar provision has not yet been made in the Irish Free State.

Erratum.—Sir John Ross is much obliged to two American correspondents for drawing his attention to an error in his article on "The Reform of the Second Chamber," published in vol. vii, part 4, of the *Journal*. Since the admission of the State of Arizona in 1912, the United

States Senate consists of 96 members, and not 90 as stated by him. Since 1913, the election is not made by the State Legislatures, but by the people.

Editorial.—Sir M. Sheldon Amos and Professor Walton have kindly consented to act as Editors of the *Journal* upon the resignation of Sir Lynden Macassey and Mr. C. E. A. Redwell. In the interim, the present number has been edited by Sir Anton Bertram, and arrangements have been made for the new Editors to assume their responsibilities with the next issue.

Upon the death of Sir John MacDonnell, four years ago, Sir Lynden Macassey consented to fill the gap by adding this work to the many other calls upon his time, and the Committee gratefully appreciate the way in which he has carried on the undertaking until there was an opportunity to hand it over to others who could be relied upon to maintain the standard and scope of the *Journal* of the Society.

NOTICES OF BOOKS.

THE LAW OF PARTITION IN CEYLON.[1]

Mr. A. St. V. Jayawardene, K.C., who is a Judge of the District Court of Colombo, and has acted for lengthy periods on the Supreme Court bench, has published a new edition of his work on the *Law of Partition in Ceylon*, which was reviewed in this *Journal* some twenty years ago.[2]

Partition is a highly important department of the law of Ceylon, and it is needless to say that the subject has been greatly enriched by the decisions of the last twenty years. The author, whose experience on the subject is probably unique, and who brings to his task that inestimable and indefinable quality which long practical experience of the Bar and Bench alone can give, introduces the subject with a weighty and lucid Preface, which deals not only with some of the more important of these decisions but also with the Report of the Commission appointed to inquire into the condition of the law. All that the author has said in this Preface deserves, and is certain to receive, the most respectful consideration.

This new edition will be indispensable both to the Bench and the Bar of Ceylon, but it has also a certain importance from the point of view of Comparative Legislation. The Courts of Ceylon have wrestled with the problems of the law of partition for the last sixty years. But it is not only in Ceylon that these problems have arisen. Wherever a country has a system of peasant proprietorship, and wherever under the system the land of a proprietor is shared out among his children at his death, it is inevitable that the very same questions should present themselves as those which have confronted the legislature and judiciary of Ceylon. Family lands (unless custom prescribes some system of distribution on death) become subdivided into minute fractional shares, held in common (some of the fractional interests that appear in Ceylon partition cases are preposterous); individual shareholders gradually acquire, or seek to acquire, separate interests by prescription; no common working or development of the land is possible, and rival interests and claims—sometimes centring round shares in a coconut tree—become the source of murder and riots. Whenever, through the development of events, the system of common working of the family

[1] *The Law of Partition in Ceylon*, by Don Adreas St. Valentine Jayawardene, K.C. (Colombo: *The Ceylon Daily News*. Rs. 15.)

[2] See review by Dr. Walter Bisschop, *Journal of Comparative Legislation*, New Series, vol. vi, pt. 2 (no. xiv.), pp. 232–6.

lands has become impossible, a situation arises for which partition is the only possible remedy.

Should this situation present itself—as one would think it certainly must—in other portions of the British Empire, any Commission appointed to consider the subject, and any law-officer essaying to draft an Ordinance, should find an invaluable storehouse of material in the work of Mr. Jayawardene.

Indeed, as one turns over its pages one realizes that questions that have been faced and settled in the experience of Ceylon (some of these, as the author very forcibly argues, in not the best possible way) are questions which must present themselves to anyone who sits down to think out the subject. Thus it is essential in an agricultural community such as that of Ceylon that a title conferred by the Court under a partition or sale in a partition action should be indefeasible. The judgment must be a judgment *in rem*. For this purpose notice must be given to "all the world" in an effective manner. Provision must be made for intervention at any stage of the proceedings. As every intervention requires fresh notices and proceedings, the suit prolongs itself and the intolerable burden of costs begins to hang like a cloud over the crowd of family litigants. What, again, is to happen to the absent shareholder who some day returns to the scene and finds that his land has been partitioned without his knowledge? Bearing in mind the conclusive nature of the title which it is about to confer, what course must the Court itself pursue in the measure of proof which it exacts?

The conclusive nature of this title generates yet other problems. A partition suit is liable to be instituted, not for the purpose of the more convenient possession of the property or divided share, but for the purpose of resolving tangles of title and giving security. The speculative purchaser appears on the scene. Economic development may be converting the lands of an agricultural peasantry into a tea or rubber estate. One speculator buys up all the titles he can discover and transfers them to the promoters. Another discovers some unsuspected outlying interest, and, waiting till the land has been planted and developed, brings his partition action, not for the purpose of getting the estate partitioned, but for the purpose of levying blackmail.

Again, to pass to another department of the subject—what is to be done about improvements? A member of the family builds a house at one corner of the land. Another plants a plantation elsewhere. Customary interest, too, may be acquired by persons who are not proprietors. How are all these things to be provided for? And what is to be done for the creation or preservation of necessary servitudes?

Further, what is to happen when the land partitioned or to be partitioned is found to be subject to an unsuspected *fidei-commissum*? The Ceylon Courts have decided that a *fidei-commissum* is no obstacle to a partition, and that if the existence of a *fidei-commissum* is discovered after a sale in pursuance of the order of the Court, it attaches to the

several shares, notwithstanding that a purchaser may have purchased without notice. The same doctrine has been applied to constructive trusts, with this difference that here the *bona fide* purchaser without notice is protected.

Enough has been said to indicate that a study of the experience of Ceylon is essential to any legislator who has to address himself to the problems of the law of partition. Mr. Jayawardene presents that experience in a very convenient form. It is true that his book is not an ordered exposition of the subject, but takes the form of a commentary on the text of the law. But this is inevitable, where the law is embodied in a particular statute, superseding previous legislation and showing traces of its historical growth. But Mr. Jayawardene, bearing in mind the interests of the out-station practitioner or judge—to whom all reports are not readily accessible—has pursued the method which he adopted in his work on *The Registration of Deeds in Ceylon* and has set out in his commentary such extensive extracts from the judgments in the leading cases that the practitioner, or the student, can obtain a mastery of the law without reference to the actual reports. This method is followed with very great judgment and discretion, and should make the book specially valuable to the " comparative legislator."

The first edition contained a very interesting historical introduction, but this was so fully dealt with in Dr. Bisschop's previous review that it will be sufficient to refer to his observations.

It is impossible to speak too highly of the exactitude and industry with which the scheme of the work has been carried out, and the author is to be congratulated, not only on having contributed a work of permanent value to the jurisprudence of the country, but also on having presented the experience of his country in a form which, it is to be hoped, will prove useful in other parts of the world.

ANTON BERTRAM.

PRIVATE INTERNATIONAL LAW.[1]

NOTWITHSTANDING the increasing literature on the subject, Professor Westlake's treatise still remains the most scholarly and authoritative exposition of this difficult branch of English Law. The appearance of a new edition of this legal classic within three years of the issue of the sixth edition furnishes striking evidence of the constantly increasing importance of the department of law with which it is concerned. In this short interval, as Mr. Bentwich informs us in his Introduction, nearly one hundred decisions have been given which have amplified the rules formulated by Professor Westlake or may be the basis of fresh developments. With regard to the new edition it should suffice to repeat the words of the reviewer of the sixth edition in this *Journal* that Mr. Bentwich has done his pious work, as might be expected, supremely well, and

[1] *A Treatise on Private International Law.* By the late John Westlake, K.C., LL.D. Seventh edition, by Norman Bentwich, Attorney-General of Palestine, Barrister-at-Law. Sweet & Maxwell, Ltd., 1925. (27*s.* 6*d.* net.)

deserves the thanks of all who are called upon to deal with questions involving the conflict of laws.

Some minor criticism may, perhaps, be permissible. The editor shows an excess of caution in dealing with the question of capacity on the ground of age. It is hardly conceivable that the reference to domicile should be made in the case of ordinary mercantile contracts and it might be stated to be at least probable that the Courts would adopt the *lex loci contractus* in such cases. The article of The Hague Convention of 1912, dealing with bills and cheques, to which Mr. Bentwich makes reference (p. 48) shows the general tendency in such matters. The statement in the note on page 347, referring to *Stathatos* v. *Stathatos*, that an Englishwoman married to a foreign husband and deserted by him " has been held to be able to regain her English domicile of origin " so as to be qualified to sue for an English divorce, requires some qualification. The assumption of an English domicile in this case and the later case of *De Montaigu* v. *De Montaigu* is in the nature of a fiction adopted with the object of avoiding serious injustice, creating an exception to the general rule of jurisdiction and illustrating the saying of Mr. Justice Holmes that the life of the law is not logic but experience.

D. T. O.

THE PHILOSOPHY OF LAW.[1]

Mr. Ronald R. Faulke, of the Philadelphia Bar, has attempted to compass a " short plain statement of the essential nature of law " in 102 small pages of large print. It is difficult to understand the object that he had in mind. The book is quite useless to the learner because it simply contains dogmatic statements of the author's particular views, and it is equally valueless to the advanced student because it fails to give detailed arguments in support of its contentions.

Its chief characteristic is a wholesale overthrow of all the ordinary language employed in jurisprudence. The word " state " is discarded (p. 17), the word " law " is " ambiguous and shall be avoided whenever possible " (p. 29), " right " is " useless for the purpose of expressing thought and will therefore be discarded " (p. 38), and " duty " is a useless fiction (p. 42). It is quite possible to discover cogent reasons for views of this kind, and many jurists have attempted to clear up the ambiguities of this subject, but it serves no good purpose to do so by merely making a series of dogmatic statements, most of which are of a highly controversial character.

H. J. R.

AN INSURANCE LEXIKON.[2]

A Dictionary of Insurance which deals with all questions of interest to the insurance world in alphabetical order and from an international

[1] *The Philosophy of Law.* By Ronald R. Faulke, 1925. (Philadelphia : The John C. Winston Co.)

[2] *Versicherungs Lexikon.* Edited by Professor Dr. Alfred Manes, with the co-operation of well-known national and foreign practical men and theorists. (Berlin, 1924.)

standpoint must be of great value, not only or mainly to those who are daily practising the intricate details of the insurance profession, but also largely to the student of problems in connexion with the insurance in its various branches. Dr. Alfred Manes, Professor at the Commercial University of Berlin, was the first to publish such a dictionary in 1909, which has remained the only one of its kind. In 1913 a supplement was printed, and now—on the occasion of the twenty-fifth anniversary of the German Union for the Science of Insurance (Deutscher Verein für Versicherunge-Wissenschaft) of which Dr. Manes is the President—a second edition has come to light. But for the political and international conditions of the last decade a new edition—which seemed to have been in contemplation for some time—would have been published before in view of the success which was attained by the first edition. Of it the *Spectator* of New York, *inter alia*, wrote: "The Insurance Lexikon is one of the most valuable reference books of its type ever produced."

The second edition is greatly increased, compared with its size when it first appeared. Its 300 original subjects, on which 16 practical and scientific men had given their expert knowledge, have grown to 500, while 46 learned collaborators have taken the trouble of placing the latest information on these various subjects at the disposal of the reader. Among the collaborators we find German, Dutch, Finnish, Swedish and Swiss gentlemen and one lady. Among them they have supplied information regarding almost every branch of insurance.

These branches have been arranged in ten main groups, viz: life, fire, accident, transport, social (insurance against illness, old age, unemployment, etc.), hail and cattle insurance, reinsurance, medical assistance and a number of smaller branches which together comprise some 75 minor subjects of insurance. All of these articles, in so far as they had been dealt with in the first edition, have been brought up to date, some have been rewritten and others have been newly supplied. Added to these is a general part which deals with subjects of interest to the insurance world and the biography of some eighty notable men in connexion with insurance in general; a large number of problems regarding the contract of insurance and insurance policies and on insurance administration and bookkeeping. At the end of the work is an alphabetically arranged subject index which not only indicates the articles dealing with the various subjects, but also the most important matter in the various articles.

It is a monumental work, well edited and carefully prepared, which should find its use far outside the country of its origin. As it is written in a language which is not understood by every practitioner there should be an inducement for an enterprising publisher to give us a translation into English or an English edition thereof.

W. R. Bisschop.

HUGO GROTIUS.[1]

MR. KNIGHT is well known as a diligent student of the life of Hugo Grotius, and he has already contributed several papers on the subject which have been published in the *Transactions of the Grotius Society*. It was appropriate, therefore, that he should prepare, and the Grotius Society publish, a volume embodying the results of the researches of several years, which, in the words of the author, should do "something towards placing the biography of Grotius upon a modern footing."

It was nevertheless bold of the Society to publish a work which is by no means complimentary to their patron saint, for Mr. Knight is no hero-worshipper, and is not inclined to accept what he describes as the "conventional estimate of history as to the personality of Grotius." The "modern footing," as he conceives it, will dethrone Grotius from the proud place he has hitherto occupied, except so far as Biblical criticism is concerned, and will also show him to be very different in character from what has hitherto been supposed. The conventional portrait of Grotius is in the main, although by no means exclusively, based upon Casaubon, who described him as "that wonderful man." "His countenance speaks honesty and his speech reveals the profoundest learning and the most sincere piety. Do not think I am his only admirer, for all learned and good men think the same as I, particularly the King."[2] Mr. Knight dismisses this certificate of character with the remark that Casaubon was at that time a somewhat weak-minded man when in contact with a dominating personality; the eulogies of other friends of Grotius he refers to either not at all or in a similar summary fashion.

Mr. Knight's own view is very different. He describes Grotius as assertive and pushing, restless and ambitious, proud of himself, his ability, accomplishments and personal appearance; a superior person determined to attain, apparently by any means, an exceptionally distinguished position in life. What is Mr. Knight's evidence for this very unpleasant picture? It seems to be based entirely on a letter of Archbishop Abbot's, written while Grotius was on a visit to England with a Dutch mission in 1613, in which he is described as "tedious and full of tittle-tattle . . . full of words and of no great judgment . . . a smatterer." Now this letter is not, it is submitted, good evidence. Abbot was no doubt a very conscientious man, but he was a strict and narrow Calvinist at perpetual war with Laud and the "High Church" Party, and yet harsh and rigorous to the Nonconformists. To such a man Grotius, who was well known as one of the leaders of the Arminians in Holland and who was endeavouring, while in England, to influence the King in the same direction, would be anathema. That religious antipathy was at the bottom of Abbot's view is clear from the Archbishop's letter

[1] *The Life and Works of Hugo Grotius.* By W. S. M. Knight. (The Grotius Society Publications, No. 4. London: Sweet & Maxwell. Pp. 304 + xiv. Price 10*s.* 6*d.* net.)

[2] *I.e.* King James I of England.

on which Mr. Knight bases his own estimate of Grotius, and Mr. Knight impliedly admits this himself. Yet he contents himself with saying that Abbot " may, possibly, have been slightly prejudiced." All that we know of Abbot, and all that Mr. Knight prints about him, serve to show that his prejudices, reasonable or unreasonable, were far from slight. It may be that Grotius has hitherto occupied too exalted a pedestal, but Mr. Knight must produce much better evidence than he has done before the " conventional estimate " will be seriously modified.

When Mr. Knight proceeds to criticize the right of Grotius to be considered as the founder of international law, he is, in our opinion, on much safer ground. In the *De Jure Prædæ*, as Mr. Knight points out, Grotius was largely indebted to the Spanish theologians and jurists, from whom most of his material was drawn, while much of the most valuable portion of the *Mare Liberum* (in itself only the twelfth chapter of the *De Jure Prædæ*) was drawn from the *De Jure Belli* of Albericus Gentilis. Sir Erskine Holland has already shown how largely Grotius was indebted to Gentilis, not only for the erudition, but also for the method and arrangement of the *De Jure Belli ac Pacis*, and he has maintained that it is Gentilis rather than Grotius who should be regarded as the founder of the science of international law.

If, then, the *De Jure Belli ac Pacis* exhibits so little originality, it may be asked why Grotius has generally been recognized as the " father of international law " and why his book has had so high a reputation and so widespread an influence ever since its publication in 1625. The reason seems to be that the treatise appeared at the right psychological moment—just when the outbreak of the Thirty Years War was turning the minds of all thoughtful men to the necessity, on the one hand, of reducing as far as possible the " just " causes of war, and on the other, to the amelioration of the conditions of war. The volumes of Ayala, of Gentilis, and of their precursors had been for the most part forgotten, and therefore the work of Grotius was hailed as presenting a view of international law peculiarly applicable to the Europe of the day, in which the authority of both the Emperor and the Pope had largely disappeared, and in which the new-found independence of the several States, particularly within the limits of the old Empire, threatened to plunge the Continent into anarchy and barbarism.

Grotius should undoubtedly occupy a very high place among jurists, not so much on account of the originality of his work (for which, it may be remarked, he himself never claimed originality), but as the author of a volume which, while resting mainly on the labours of earlier jurists, has had incalculable effects on the growth of international law, because it was presented to a distracted world striving to find some binding link, and finding it in the theories of the *De Jure Belli ac Pacis*. But it must not be forgotten that Grotius made at least one great original contribution to the science of international law—the principle of the pacific settlement of international disputes by arbitration, a principle which is only now coming to fruition.

D. B. Toye.

THE GRANT OF A CONSTITUTION TO THE MANDATED TERRITORY OF SOUTH-WEST AFRICA.

[*Contributed by* E. L. MATTHEWS, ESQ., C.M.G., K.C.]

UNDER Act No. 42 of 1925 of the Parliament of the Union of South Africa, provision is made for the grant of representative institutions to the mandated territory of South-West Africa. As is well known, the Government of the Union has held from the Council of the League of Nations a mandate to administer, and legislate for that territory since Germany, under the Treaty of Versailles, renounced her right and title in respect thereof in favour of the Allied and Associated Powers. A fuller reference must necessarily be made presently to the terms of the mandate. It is sufficient now to mention that the mandate is one of those of the " C " class described by Professor Berriedale Keith in this Journal.[1]

That the Union Government would at the earliest suitable opportunity make provision for some form of representative Government of the territory by the European inhabitants thereof has been recognized since it undertook the mandate in 1920. The only questions were as to the time at which, and the form in which, such provision should be made. The settlement of the first of these questions depended very largely on the settlement of another question, viz. what should be in the future the national status of the German inhabitants of the territory. It would serve no useful purpose to describe the negotiations which took place on this matter with the leaders of those inhabitants. It is sufficient to say that when General Smuts was in London in the latter part of 1923, he took the opportunity of meeting, and discussing with, representatives of the German Government certain matters in relation to the territory. Two of these matters were (1) the acceptance by the Germans in the territory of naturalization as British subjects of the Union of South Africa, (2) certain difficulties in connexion with the position of German private schools in relation

[1] *Journal of Comparative Legislation*, Third Series, vol. iv, pt. i, p. 74.

to the education laws of the territory. To this matter (2) a fuller reference will presently be made. As regards (1) it may be said that as a result of the London agreement, an Act of the Union Parliament (No. 30 of 1924) was passed whereby

every adult European who, being a subject of any of the late enemy powers, was, on January 1, 1924, or at any time thereafter before the coming into operation of the Act (September 15, 1924), *domiciled in the Territory* is, at the expiry of six months after the last-mentioned date to be deemed to have become a naturalized British subject under the Union Naturalization Act 1910 (*i.e.* a naturalized British subject of the Union), unless within that period of six months he signs a declaration that he is not desirous of becoming so naturalized.

Those Germans and other ex-enemy nationals then domiciled in the territory who did *not* make such a declaration within the prescribed period thus became, on March 15, 1925, entitled to all the rights and privileges and subject to all the obligations to which a British subject is entitled or subject, within the Union *and the Territory*. The Bill for this Naturalization Act was prepared during the Premiership of General Smuts. On assuming the premiership after the general election a few months later, General Hertzog lost no time in taking steps that the Bill be passed into law and practically in the form in which he found it. The change made was that under the Act as passed, British nationality became automatic unless the ex-enemy subject made the declaration. Under General Smuts's Bill the ex-enemy subject had to apply. The change of Government in the Union has made no difference to the policy pursued by the Union as mandatory, though it is possible that the form of the constitution which would undoubtedly have been granted if there had been no such change may have been somewhat different from that which is the subject of this article. It may be mentioned that all questions connected with the territory come directly under the Prime Minister of the Union.

When March 15, 1925, arrived, 3,228 Germans or ex-enemy subjects in the territory had become naturalized under Act 30 of 1924. A very small percentage (261) made the declaration that they were not desirous of becoming so naturalized. It was possible, therefore, to proceed at once with the grant of a constitution. General Hertzog, who had a few months before made a tour of the territory, met, later on in Cape Town, representatives of various shades of opinion of the German population as well as representatives of what may be described as the Union section. At those meetings he laid the

draft constitution before them. Criticisms were made and met, and suggestions were put forward by these representatives and were in some cases adopted; but it is possible to say that the Bill as originally framed after General Hertzog's visit to the territory, is the Act 42 of 1925 which is discussed and described in this article. Further, it passed both Houses of Parliament without any but verbal amendments and after the shortest possible debate. It had been submitted, before its introduction into Parliament, to General Smuts and the other leaders of the Opposition, who met the Prime Minister in consultation upon it.

The constitution takes effect as from April 1, 1925, when the preliminary work of registering voters and delimiting constituencies will have been completed.

Before attention is drawn to the specific provisions of this Constitution Act, it may be useful to summarize as shortly as possible the position when it was enacted, of the Union Government in relation to the Territory of South-West Africa; also to indicate, by reference to the post-war laws of the territory, the policy pursued by the Government and its representative (the Administrator) in the territory in carrying out the powers and duties of a mandatory therefor. The Union Government had, and has still no *locus standi* in the territory except under the Treaty of Versailles and the mandate issued by the Council of the League of Nations. By Art. 119 of that Treaty, Germany renounced her right and title to South-West Africa in favour of all other parties to the Treaty. Such renunciation, therefore, was in favour of the Allied and Associated Powers. By Arts. 120, 121 and 127 it is recognized that some Government will exercise authority over the territory. The sixth paragraph of Art. 22 of the Treaty mentions specifically South-West Africa as an illustration of a territory which can best be administered by the Government of a geographically contiguous State acting under a mandate from the League of Nations. Further, the territory is, under this article of the Treaty, to be administered *under the laws of the mandatory* as an *integral portion* of the mandatory's own territory. The expression "laws of the mandatory" must obviously include not only laws in force in the mandatory's own territory, but also laws which the mandatory may put in force in the *mandated* territory.

In September 1919—by Act 49 of 1919—the Union Government obtained from the Union Parliament authority to do such things as may be proper and expedient for giving effect to any mandate

that may be issued in pursuance of the Treaty of Versailles with reference to this territory, and to issue proclamations and regulations in regard thereto. That Act also specifically authorized the Union Government to repeal, alter, amend or modify any laws in force in the territory, including proclamations issued during the military occupation thereof; to make new laws for the territory; and to delegate its authority to any officer in the territory whom it might designate to act under its instructions. That officer is known as the Administrator and, under the authority so delegated to him, a large number of Proclamations have been issued by him—some of them applying to the territory in general terms, but with suitable modifications, Acts of the Union Parliament or Acts of one or other of the Provinces of the Union. Other proclamations directly enacted, in a form similar to statutes in force in the Union, legislation on matters which were considered to be of common interest to the Union and the territory; other proclamations were confined to matters peculiar to local conditions. The Act of 1919 directed that every such proclamation should be laid before the Union Parliament. That Parliament therefore may be said to have assumed from the outset ultimate control over the administration of and legislation for the territory, and here it is relevant to call attention to s. 4 of that Act of 1919 under which certain things are not to be done by the Government in the territory without the specific authority of Parliament. These are (1) the grant of state land or of minerals; (2) the grant of trading or other concessions; (3) the alienation of native reserves.

A summary will now be given of the mandatory's legislation for the territory which shows that it has, in regard to such legislation, been treated as an integral portion of the Union.

By the Administration of Justice Proclamation, 1919, the Roman-Dutch law as existing and applied in the Province of the Cape of Good Hope on January 1, 1920, was introduced as the common law of the territory, and all existing laws in conflict therewith were to the extent of such conflict repealed, except proclamations issued during the military occupation and in force on the said date, which continued to remain in force. Rights already accrued and liabilities already incurred were preserved. The effect of this proclamation was considered by the High Court in two cases in 1921 and 1923. In the former of these cases it was laid down that Roman-Dutch law had been introduced into South-West Africa, together with all the modifications which it had undergone in the Cape Province by

desuetude, custom, judicial decision, and statute, whether abrogating or enacting. It was accordingly held, in the former of the cases mentioned, that the statutory law of the Cape Province relating to the execution of wills was the law of the territory. In the latter case it was held that the Cape law of prescription as contained in Act No. 6 of 1861 was also part of the law of the territory. Much of the statute law of the Union has been either specifically extended to the territory by proclamation, subject to amendments required by local circumstances, or the proclamations have taken the form of enacting legislation on similar lines or in similar terms. Amongst such statutes may be mentioned those relating to interpretation of laws, solemnization of marriages, insolvency, administration of estates, deeds registration, companies, bills of exchange, stamp duties, prisons, profiteering, rents, public health, pounds, liquor licensing, inquests, concealment of birth, protection of girls and mentally defective women, prevention of cruelty to animals, stock theft, diseases of stock, vagrancy, masters and servants, police offences, preservation of game, and usury. Certain portions of the German law (for example, that portion relating to mining) have been kept alive by express provisions in proclamations issued by the Administrator.

The law in force in South-West Africa includes, therefore, (i) the Roman-Dutch law, with the modifications it has undergone in the Cape Province as explained above; (ii) certain Union Acts of Parliament which apply directly to the territory; (iii) proclamations issued by the Administrator, some of which specifically introduce Union statutes; (iv) those portions of the German law which have been expressly preserved; and (v) those fragments of the German law which have survived by reason of the fact that they do not conflict with any of the laws already mentioned.

On January 1, 1920, Military Courts were abolished and Civil Courts established. A Superior Court, entitled the High Court of South-West Africa, was created, consisting of a single judge. It has its seat at Windhoek, but may be held at other places appointed by the judge. In civil cases the judge sits alone, but in criminal cases the Court is composed of the judge, who is president, and two other members, who must be either advocates or magistrates. The decision of the majority constitutes the judgment of the Court. There is no jury.

An officer, styled the Attorney-General, has been appointed who, in regard to the prosecution of crimes and offences, possesses the

powers of an attorney-general in a Province of the Union under s. 139 of the South Africa Act. There are also a Registrar and a Master of the High Court, a Registrar of Deeds, and a Sheriff.

By Proclamation No. 38 of 1920, Circuit Courts were established, with a similar constitution to that of the High Court. The territory is divided from time to time into two or more circuit districts, in each of which two Circuit Courts are held annually.

An appeal from the High Court or from a Circuit Court, whether in the exercise of either civil or criminal jurisdiction, lies to the Appellate Division of the Supreme Court of South Africa under the same circumstances and subject to the same conditions as an appeal lies from a Provincial Division of the Supreme Court of South Africa. In cases of an appeal from orders or judgments of the High Court or a Circuit Court upon application by way of motion or petition, or on summons for provisional sentence, or judgments as to costs only, or on civil or criminal appeals from a Magistrate's Court, special leave to appeal must first be obtained from the Appellate Division.

The law of procedure and evidence in the High Court and in Circuit Courts in civil cases is that of the Cape Provincial Division of the Supreme Court of South Africa, and in criminal cases that prescribed by the Union Criminal Procedure and Evidence Act, 1917, which has been extended and applied to the territory with certain amendments.

Rules for the conduct of proceedings in the High Court and Circuit Courts are framed by the Judge of the High Court, and subject to the approval of the Administrator.

Magistrates' Courts were also established on January 1, 1920, which have the same jurisdiction and observe the same procedure as the Magistrates' Courts in the Union.

The power to remit sentences is vested in the Administrator, except as regards death sentences, in which case the prerogative of mercy may be exercised by the Governor-General in Council of the Union. The official languages of the Courts are English and Dutch, but, as will be presently pointed out, under the new constitution the German language may be used by litigants or their representatives in addressing the Court. In criminal cases interpreters are provided in other languages free of charge, and in the High Court an interpreter in the German language is provided free in civil cases also.

On certain matters the Union Parliament has itself assumed

the right to legislate directly for the territory, whatever view may be taken as to its powers being technically limited to the enactment of laws for the peace, order and good government of the Union.

Illustrations of these matters are :

An Act of 1920 which makes the Appellate Division of the Union Supreme Court a Court of Appeal from the High Court of the territory.

An Act of 1921 which provides that, for all purposes of customs and excise, the territory (including Walvis Bay) is to be regarded as part of the Union.

An Act of 1922 which vests the railways and harbours of the territory in the Union Government, directs that they shall be controlled, managed and worked by the Union Railway Administration as part of the Union system, and applies the Union Railways and Harbours Management Acts, the Railway Board Act and Railway and Harbour Service Acts to the territory railways and harbours as so vested.

An Act of 1922 which places Walvis Bay under the territory for administrative purposes and applies its laws to that port and settlement ; this Act also provides for the reciprocal service of Court process as between the Union and the territory.

An Act of 1923 (the consolidating Public Service Act of the Union) which treats the territory as part of the Union for all purposes relating to officers in the employment of the Administration of the territory, thus putting them in a position similar to that of officers serving under the Provincial Administrations of the Union.

It will be seen, therefore, that the policy of the Union Government has been so to administer and legislate for the territory as if it were an integral part of the Union ; for such are the terms of Art. 22 of the Treaty of Versailles and are also the terms of the mandate. That policy has been possibly to some extent influenced by the belief that the territory may in the future be still more intimately bound up with the Union in one form or another.

In December 1920 the Council of the League of Nations issued its mandate. That mandate was conferred upon " His Britannic Majesty *for and on behalf of the Government of the Union of South Africa,*" which is defined as the " Mandatory." This document gives the mandatory full power of administration and legislation over the territory as an integral portion of the Union and authorizes him to apply the laws of the Union, subject to such local modifications as circumstances may require.

The mandatory is subjected, in his administrative and legislative powers, to the following restrictions only :

(*a*) He is to prohibit the slave trade and to see that no forced labour is permitted except for essential public works and services ; and then only for adequate remuneration.

(*b*) He is to see that traffic in arms and ammunition is controlled in accordance with a certain Convention.

(*c*) He is to prohibit the supply of intoxicating liquor to natives.

(*d*) He is to prohibit the military training of natives except for internal police and local defence.

(*e*) He is to see that no military or naval bases are established in the territory.

(*f*) He is to ensure freedom of conscience, free exercise of all forms of worship and allow missionaries who are nationals of any State member of the League to enter and reside in the territory for the purpose of prosecuting their calling.

The mandatory must make an annual report to the Council of the League, containing full information with regard to the territory and indicating the measures taken to carry out its obligations under the mandate.

The mandate cannot be modified except with the consent of the Council of the League.

One provision of the mandate is that the mandatory shall promote to the utmost the material and moral well-being and the social progress of her territory.

To enable the mandatory to carry out this last injunction, a proclamation was issued in January 1921, constituting an Advisory Council whose functions were to advise the Administrator of the territory :

(*a*) As to the raising of revenue for the territory.

(*b*) As to the appropriation of moneys for the public services and the allocation of expenditure.

(*c*) As to matters of general policy in relation to legislation and administration, apart from routine matters.

(*d*) As to any other matters on which the Administrator may request its advice.

This Council consisted of 9 members appointed by the Administrator. All its members were persons ordinarily resident in the territory and were directed to be persons fully representative of farming, commercial, mining, wage-earning and native interests. Except in the case of one member appointed to

represent native interests, no member of this Council could be an official.

The position, therefore, at the time of the enactment of the Constitution was that :

(1) The administration and legislation of the territory was, in essential matters, assimilated to that of the Union.

(2) Representatives of the European inhabitants had been called into consultation in relation thereto.

(3) This had been done in pursuance of the actual terms and the spirit both of the Treaty and of the mandate.

These facts, the acceptance by the Germans of Union citizenship and the general conditions prevailing in the territory made it possible to make a considerable step forward as regards (2) without the mandatory divesting himself in any way of those full powers of administration and legislation which he possesses under the Treaty and the mandate. In fact the position was such that the mandatory could most effectually carry out that provision of the mandate under which he is to promote the material and moral well-being and social progress of the inhabitants, if these are enabled, through their representatives, to assume an active responsibility for some of the laws and administrative acts under which they are to live. The Constitution Act may be said therefore to indicate an intention on the part of the mandatory to delegate to representatives of the inhabitants some of his powers, subject always to his retaining a veto and ultimate control. With that object, therefore, the Act provides for the constitution of an executive committee, a legislative assembly and an advisory council for the territory and defines the powers, authorities and functions of each such body.

A matter of form required consideration, viz. whether the grant of representative institutions should come from the Government as mandatory or from the Union Parliament which controls the mandatory. There was of course no question that the mandatory, so long as he does not go beyond the terms of the mandate, could lawfully, without recourse to the Union Parliament, associate with himself in the administration of and legislation for the territory, representatives of the inhabitants, and do so by the issue of a proclamation. But, inasmuch as the Union Government had obtained the authority of an Act of Parliament (Act 49 of 1919) to undertake the mandate and to legislate for and administer the territory, and inasmuch also as it had, perforce, on the previous occasions indicated above, to seek from Parliament the enactment

of some fundamental laws for the territory, owing to the fact that the Government's proposals would have affected or modified in some ways laws enacted by Parliament, it was thought fitting, and to some extent legally necessary, that any provision for the grant of representative institutions in the territory should be considered in detail and enacted by Parliament. The Government, therefore, in s. 1 of the Act was given by Parliament authority to grant a constitution, but to grant it in certain specific terms. But in seeking authority to make such a grant, the Government had to consider its responsibilities as mandatory, that is to say in placing before Parliament for its approval a form of constitution, the Government had to bear in mind that it must, as mandatory, responsible to the League, retain full powers of administration and legislation over the territory, and that these had been conferred by the mandate and could not be surrendered except with the consent of the Council of the League. The acceptance of those powers as indicated in the Treaty of Versailles was approved by Parliament in the Act of 1919. The Constitution Act therefore provides that the Act of 1919 shall remain in force in all respects, and that the Government shall retain its full powers of administration either directly or through the Administrator whom it appoints to act on its instructions and shall at the same time retain its full power of legislation. This is done (*a*) by reserving to the Union Government power to make laws, including the power in certain specified events to appropriate public moneys and to impose the necessary taxes to defray costs of administration (ss. 38 and 43 of the Act) ; (*b*) by reserving to the Union Government the power to veto any laws passed by the representative assembly to be established in the territory (s. 33) ; (*c*) by a provision that no law passed by that representative assembly or any proclamation which the Administrator may have issued shall be of force and effect, if inconsistent with an Union Government proclamation for the territory or with an Act of the Union Parliament applicable to the territory (s. 44). It is convenient now to summarize the provisions of the Act. It provides for (*a*) an executive committee for the territory ; (*b*) an advisory council for the territory ; (*c*) a legislative assembly for the territory.

To understand the functions of (*a*) and (*b*) it is necessary first to deal with the functions of (*c*) the legislative assembly.

S. 13 of the Act provides that this body shall consist of 18 members, one-third of whom are to be nominated by the Adminis-

trator from voters resident in the territory. His nominations are to be subject to the approval of the Union Government. The other two-thirds are to be elected by direct vote of those adult male *European* inhabitants of the territory who are British subjects or who have or may become British subjects in the Union under its Naturalization laws as applied in 1924 to the territory.

A schedule has been annexed to the Act providing for the registration of such inhabitants as voters and for the manner of holding the elections of the elective members of the Assembly. So far as the registration of voters is concerned there will be no disqualifications other than lack of residence in the territory and conviction of serious crime; disqualifications which are in the same form as exist under the wide franchise prevailing in the Transvaal and Orange Free State under the constitutions granted to those territories in 1906 and 1907. The provisions as to the conduct of elections are similar to those obtaining in the Union under the Electoral Act of 1918. A further reference to the schedule to the Constitution Act will be made presently.

In fixing the number of the Assembly members at 18, regard has been had to the fact that while the territory is large, its European population is small and scattered. At the last census taken in 1921 the European inhabitants numbered 19,432 of whom 11,242 were males and 8,190 were females. These were scattered over an area of 322,393 square miles: 3,460 lived in Windhoek, the capital; 1,003 in Luderitzbucht, the centre of the diamond fields; 1,026 in Keetmanshoop; 1,078 in Swakopmund, the port. The German inhabitants of the territory at that census numbered 4,602 males and 3,253 females. There were 190,298 natives of the Bantu races and 5,180 Rehoboth bastards and others of the same type, including a few Cape coloured people. Further, regard had to be had to the fact that the population had had no experience of representative institutions, and it was improbable that for some time there would be many who would have the leisure to devote to public work. And in this connexion it is relevant to mention here that the territory under the German régime had not reached the stage even of British Crown Colonies, much less that of self-governing colonies or dominions. The Landesrath, consisting of 34 members, of whom 19 were nominated by the Government, was merely an advisory body and all fiscal edicts were issued by the Governor. The estimates of revenue and expenditure prepared in the territory required the sanction of

the Imperial Reichstag. And this supervision by the Imperial German Government was held to be justified on the ground that Imperial grants were made annually to the Territory, although these grants merely approximated to the cost of the military establishment. Further, the Imperial German Government guaranteed the loan issued for the purpose of building railways. The control of all revenue and expenditure (including that of the railways other than privately owned railways, but excluding the postal and telegraph revenue) was exercised by the *Finanz Referent* under the Governor. The Posts and Telegraphs were a branch of the Imperial Department and quite distinct from the Territory administration. Certain revenues were assigned by the Governor to municipal and district councils, *e.g.* dog tax, liquor licences, trading licences, and the local authorities were also empowered to raise funds for local purposes by means of an income tax.

To return, however, to the Constitution of the New Legislative Assembly.

To divide the territory into 12 constituencies for the election of the elective members it was first necessary to frame a complete voters' roll for the whole territory. The number of voters registered at this first registration was 6,092. This has been done through the machinery of the existing magisterial districts. Provision is made in s. 12 of the Act when that task was accomplished for the appointment of a commission, presided over by a person of judicial or legal standing, to divide the territory into single member constituencies, each containing as far as possible an equal number of voters. The commission was directed to have regard to community or diversity of interests in fixing the boundaries of each constituency.

The only qualification for membership of the Assembly, whether nominated or elected, is that the member shall be a voter in some constituency in the territory—in other words, he must be an adult *male European* who is a British subject and is resident in the territory. But certain disqualifications are provided in ss. 17 (2) and 18 of the Bill similar to those which exist in relation to membership of the Union House of Assembly, viz. conviction for serious crime; insolvency; insanity; holding an office of profit under the Crown; ceasing to be a voter; and prolonged absence from attendance in the Assembly.

The Assembly, when complete by nomination and election, must (s. 19) meet within two months of the election and thereafter once

at least in every financial year, and so that not more than 12 months elapse between the conclusion of one session and the commencement of another. According to the precedent of the Union Provincial Councils, the Assembly will endure for three years from the date of its first sitting, except that power is reserved to the Union Government in special circumstances to dissolve it before that time (s. 14). For instance, a deadlock may arise between the executive and the Assembly.

The Assembly elects its own chairman and, until it does so, the Administrator presides over its sittings (s. 21). The Administrator and every member of the executive committee (even though, in the latter case, he may not be a member of the Assembly) has the right to address it, but, if not a member of the Assembly, may not vote in it (s. 22 (2)). The presence of 9 members is necessary to constitute a quorum (s. 22 (3)).

Its members will be paid, but their allowances are fixed by the Union Government on the basis, not of annual sums, but of their daily attendance (s. 23). The minutes and records of the Assembly's proceedings are to be in both the official languages of the Union, and Draft Ordinances are to be presented to it in both these languages (s. 22 (4) and s. 31) ; but any member is permitted to address the Assembly in the German language (s. 22 (4)).

It is convenient now to deal with what must be regarded as the essential features of the Act. These are the legislative powers which it is proposed to entrust to the Assembly. In this respect the Act departs from the precedent of the Union's Provincial Councils: for the Assembly may legislate on all subjects concerning the territory except on those which are expressly reserved, permanently or temporarily, from its consideration. When regard is had to the terms of the mandate, to the terms of certain Union Acts of Parliament, to the fact that the railway officials and nearly all the public officials are Union public servants, to the fact that one day in the future the territory *may* become still more closely identified with the Union, and to the further fact that it is desirable that the right of veto retained by the Union Government should be exercised as sparingly as possible, it was thought desirable, generally to reserve permanently from the Assembly's activities certain subject-matters (s. 26).

In addition, there were other subjects to which these considerations do not apply, but which, owing to circumstances and conditions at present existing in the territory and probably soon

to disappear, it was thought desirable to reserve from the Assembly's consideration during the first three years of its existence, *i.e.* until after the second general election.

Among the subject-matters permanently reserved are native affairs and the taxation of natives. No direct taxation Ordinance passed by the Assembly, however general in terms, will apply to any native. This reservation must be regarded as consequential upon the special provision of the mandate quoted above, which entrusts the mandatory with a special care of the interests of the native population (s. 26 (a)).

A digression may perhaps be conveniently made here to summarize the position of the native under the laws now in force. Mention has been made of the fact that the natives in the territory numbered at the 1921 census about 190,000. In some areas officers have been specially appointed for the purpose of native administration, whilst in the other districts the control of native affairs is vested in the stipendiary magistrates. The main provisions of the law specially affecting natives (apart from those dealing with masters and servants which is practically the law as it exists in the Cape Province) are embodied in the following enactments: (*a*) the Native Administration Proclamation which supersedes the old German laws, constitutes the principal pass law, and regulates the movements of natives in the territory and of those desirous of entering it or leaving it; (*b*) the Native Labour Proclamation which governs the control and welfare of natives working in mining areas; (*c*) the Vagrancy Proclamation which provides for the suppression of idleness and trespass, but which leaves all natives free to select their own masters and prevents any forced service; (*d*) the Municipal Proclamation which empowers local authorities to make regulations, subject to Government approval, for the control and management of the urban native locations in their jurisdictions; (*e*) the Native Stock Brands Proclamation which provides for the branding and registration of the large stock of natives and frees them from the obligation of providing branding irons, which are supplied by the Administration officials, who supervise the branding; (*f*) the Liquor Proclamation, which prohibits the sale, gift or supply of liquor to natives except for medicinal purposes on a medical prescription.

In addition to the land occupied by natives under German treaties, eight or more larger areas have been set aside under the Native Administration Proclamation of 1922. These are generally

controlled by the hereditary chief (if any) or an elected or appointed headman, who is in each case responsible to the magistrate of the district for the preservation of law and order in or about the reserves. All the areas selected for native reserves have water supplies, but as these are not conveniently distributed and are in some cases insufficient, boring operations on a considerable scale are being undertaken. Purely native areas (such as Ovamboland) and those secured by old treaties have not been disturbed.

The object of this digression is to indicate (1) the necessity (apart from the mandate) for a permanent reservation of native affairs from the Assembly's activities; (2) the impossibility of the constitution providing for other than European representation in the Assembly.

Further, the Acts of the Union Parliament which relate to (*a*) railways and harbours, (*b*) the position of the Union public servants in the territory, (*c*) Customs and Excise, have rendered it necessary to reserve from the Assembly's activity these matters also (s. 26 (c), (d) and (1)). A permanent reservation of other subjects, such as the constitution and jurisdiction of Courts of Justice, Posts and Telegraphs, Immigration, Banking and Currency, was considered desirable so that legislation on these subjects may be, or continue to be, assimilated to Union laws (s. 26 (e), (f), (i) and (k)). The terms of the mandate to which reference has already been made rendered it necessary that the establishment and control of any military organization in the territory should be among the permanently reserved subjects (s. 26 (g)). With regard to movements of the South African Defence Force within the territory (s. 26 (h)) analogous reasons exist. It may also be pointed out that while the Defence Acts of the Union have not been put in operation in the territory, all persons in the Union serving in those forces are liable under those Acts to serve in the territory *in defence of the Union*. Legislation as to mines and minerals and the taxation thereof stands in a category by itself. While it may be regarded as necessary in the interests of the territory itself that the disposal and export of diamonds should be controlled by the Union Government or its representative in the territory, it cannot be said that the diamond or other mineral laws of the territory have hitherto followed, or should necessarily follow, closely those of the Union. But the diamond industry is at present the territory's one large asset and source of revenue. Reasons therefore existed for not placing that industry under the control of a body in which its

interests could never be represented in proportion to its financial and economic importance to the territory.

These are the several circumstances which determined the selection of subject-matters reserved directly and permanently for legislation by the Union Government as mandatory.

It was felt, however, that occasions might arise on which it would be expedient to entrust the Assembly with the power to legislate on some special matter which happens to fall within one of the subjects generally to be regarded as permanently reserved. Of such expediency and of the occasion the Union Government will be the judge, and if satisfied, it may give special sanction to the introduction into the Assembly of a draft ordinance falling within such a subject.

Then there are subject-matters which the Act, in s. 27, reserves from the Assembly's activities for the first three years, *i.e.* during the lifetime of the first Assembly. At the expiration of that time it is hoped not only that the Assembly and those whom it represents will have gained some experience and knowledge of the unexpected results which sometimes follow from legislation, but also that certain now-existing conflicting interests and sentiments will have become reconciled. These subject-matters fall under four categories: (1) the Police Force, (2) Civil Aviation, (3) Education, (4) Land Settlement; and financial assistance to farmers through the Land Bank which has been established in the territory under the Administrator's proclamation referred to earlier.

Here again it was felt that it may be advisable on particular occasions to entrust the Assembly, even before the expiration of the three years, with legislative power on a matter which is technically within one of these categories; so the opening words of s. 27 provide that this may be done with the special sanction of the Union Government. After the three years have expired, legislative power on any one of these subject-matters will only be acquired by the Assembly after the Union Government has accepted a recommendation on that behalf embodied in a resolution passed by a two-thirds' majority of the whole Assembly, *i.e.* a resolution for which at least 12 members vote.

A short statement on the subject of education in the territory may indicate the reasons of its being made a temporarily reserved subject. Differences existed between the Administration and the German population up till the end of 1921, when protracted negotiations resulted in a settlement. As the result of the education

settlement 13 out of 17 elementary schools were transferred to the Administration as from January 1, 1922; 4 primary schools and 1 secondary school all in urban centres elected to remain private schools. The general principle of the settlement was that the transferred schools should be financed by the Administration and adopt the Union curriculum and system, retaining, however, German as a medium to the end of the elementary course, but that all children above Standard I receive a daily lesson in one of the official languages of the Union chosen by the parents, and that this shall become the chief medium of instruction after Standard VI. As from January 1, 1924, for a period of two years the Administration subsidized on the pound for pound principle two of the principal secondary private schools of the Germans. It may be mentioned that the subsidy to two German schools in two urban centres was one of the conditions of the agreement with General Smuts in London in 1923 when the German Government undertook to advise its nationals in the territory to accept British nationality of the Union. The subsidy was subsequently extended to three German schools in other centres.

Education generally is dealt with by a Proclamation which came into operation on January 1, 1922. That proclamation is an adaptation of the Education Ordinance of the Cape Province and provides for the compulsory attendance of all European children between the ages of 7 and 15. Primary education is free, but fees are charged in the secondary schools. All financial and technical matters relating to education are controlled by the Administration. Local committees appointed to represent the parents exist, but have merely advisory functions. There is no local education rate. It may be mentioned here that in 1922 there were 367 *German* children in Government schools. In 1925 there were 616. In 1920 there were 975 *European* children in Government schools. In 1925 there were 2,703.

The education of coloured and native children is under the supervision of the various missions, 59 mission schools being registered with the department. Of these all but 13 have qualified to receive Government financial help. So much for the legislative powers of the Assembly.

It is provided, however, in s. 29 that the Assembly shall have the right to recommend to the Union Government or to the Administrator the issue of legislative proclamations on matters permanently or temporarily reserved from the Assembly's consideration.

In this respect s. 87 of the South Africa Act (the Union Constitution) forms a precedent.

It is necessary now to refer to the provisions of the Bill which give the Assembly a very large measure of financial control. All expenditure, irrespective of the source from which the revenue to meet that expenditure is derived, is a matter for consideration by the Assembly. By s. 36 " a territory revenue fund " is to be formed and, subject to the provisions of s. 38 to which special reference will presently be made, that fund can only be drawn upon, under the authority of an Appropriation Ordinance passed by the Assembly. Under s. 37 the annual estimates of expenditure prepared by the Administrator in consultation with his advisory council must be submitted to the Assembly. Subject also to the provisions of ss. 26 and 27 as to matters permanently or temporarily reserved from the Assembly's consideration, the Assembly, on the recommendation of the Administrator, can impose taxation in any form. Where, however, taxation to meet expenditure is necessary and can only be obtained from sources falling within the reserved subject-matters, it will be imposed by proclamation of the Union Government or of the Administrator ; but when collected, the moneys obtained from such taxation will be paid into the territory revenue fund.

With regard to revenue it may here be mentioned that the principal source is that derived from the tax on the diamonds, won from the fields in the Luderitzbucht area. The assessment of this tax has been made under the German law still in force, which provided (roughly) that the Government should receive 66 per cent. realized from the sale of diamonds less 70 per cent. of the working costs. The mining revenue in the financial year ending March 31, 1925, was £278,302 out of a total revenue of £652,114. Customs and Excise in that year amounted to £121,024, the duties collected being paid into the Union Revenue, out of which is paid over to the territory annually a sum approximating to the Customs and Excise duties paid on goods consumed in the territory after deducting the equivalent on goods removed therefrom for consumption in the Union. The sum payable to the territory under this head should considerably increase. Posts and Telegraphs was the next largest source of revenue, having been £52,923 in that financial year. The main item of expenditure up to March 1925 was the Police Force, (£126,778 in that year). Other items were then Agriculture, £54,038 ; Irrigation, £65,351 ; Lands and Surveys,

£27,582; Public Health, £15,405; Education, £85,321. Administrative expenses (£64,427) account for the greater part of the remainder on a budget which more than balanced and continues to balance. Since 1920 the sum of £450,000 has been spent in water boring, which includes cost of equipment and drills, wages and transport in connexion with boring operations, windmills and plant. £169,000 of this was spent in boring on lands of new settlers. As indicated above, other considerable sums have been spent in boring for water in the native reserves.

Over all legislation of the Assembly, the Union Government as mandatory retains a veto; for, under s. 32, Ordinances passed by the Assembly must be presented to the Administrator for his assent, and cannot be promulgated as a law until his assent or that of the Union Government has been given (s. 34).

The Administrator's discretion to withhold assent is subject to such instructions as he may from time to time receive from the Union Government (s. 32). If to any Ordinance he feels unable to give assent, he must reserve the Ordinance for the special consideration of the Union Government, which may, under s. 33, override the Administrator's decision by giving its assent or may within twelve months exercise a final veto. Information will be laid before Parliament as to any such reservation or exercise of veto (s. 33 (3)); and the assent, reservation or veto will also be communicated to the Assembly. The fact of reservation of an Ordinance will be published in the Official Gazette of the territory (s. 33 (2)).

As the functions of the Executive of the territory depend on the legislative powers of the Assembly, it is possible now to refer specially to the provisions of the Bill providing for an Executive Committee. That body under s. 2 consists of the Administrator and four other members. Those four are to be chosen by the Assembly, according to the principle of proportional representation, either from amongst its own members or from outside that body. A person outside that body cannot be so chosen unless he is a voter in the territory, *i.e.* he must be an adult male European who is a British subject and is resident therein. Any disqualifications which exist for membership of the Assembly apply also to any member of the Executive Committee chosen by the Assembly from outside it. The members of the Executive Committee so chosen are to be paid salaries fixed by the Union Government (s. 5). Three members of the Executive Committee are a necessary quorum for

any of its meetings, and the Administrator or his deputy must be one of the three (s. 4 (2)). The functions of the Committee are to carry on the administration of the territory on those matters only in respect of which the Assembly is for the time being competent to enact legislation (s. 3). In these provisions the Act again follows the Union system in relation to provincial administrations. The Executive Committee as such does not however take part in the preparation of the annual estimates. That is left under s. 37 to the Administrator in consultation with the Advisory Council.

This leads up to an explanation of the last-mentioned body. It has been considered advisable, in view of the number of matters of administration with which the Executive Council will not be competent to deal, and which will fall therefore under the personal control of the Administrator, that there should be some point of contact between him and the members of the Executive on those matters. Full responsibility in regard to these matters rests with him, subject to instructions which he may receive from the Union Government, but he must need advice, and advice which will keep him in touch with the views of the inhabitants of the territory. The present Advisory Council constituted under the Proclamation of 1921 has in that respect had a successful trial. It was considered, therefore, that it might well be continued, but the coming into existence of a legislature and an executive directly representative of the inhabitants enables the representative character of this council to be more assured. The Act (s. 7) provides for the constitution of an advisory council of eight members, viz. the Administrator, three persons appointed by him subject to the approval of the Union Government, together with the four members of the Executive Committee, who, as mentioned, have been chosen by the Assembly. One of the appointed members is to be, as now, an official selected mainly for his knowledge of the reasonable wants and wishes of the native population. The other two appointed members may or may not be members of the Assembly. All, however, must be persons ordinarily resident in the territory. In addition to advising the Administrator on matters the responsibility for which rests with him (as, for example, the legislative proclamations which he should issue and matters of general policy), the Council will advise him as to whether he should give assent to, or reserve for the Union Government's consideration, Ordinances passed by the Assembly (s. 9).

Attention is now drawn to a special provision inserted to avoid

a deadlock. It has already been pointed out that the Assembly has financial control by reason of its powers to consider, criticize and pass the estimates of expenditure and by reason also of its taxation powers, though limited. But the Assembly may refuse to pass the appropriations necessary to pay the salaries of the officials or to carry on the administration or any essential services; or may refuse to pass Ordinances within its powers, imposing taxation which the Administrator certifies to be necessary to meet that expenditure. In such a case a report must be sent by the Administrator to the Union Government, which, after full consideration of the matter (consideration which is given after hearing the views of the Administrator on the one side, and of the Assembly on the other side) may enact the necessary legislation by proclamation (s. 38) under the legislative powers reserved to the Government.

It is necessary to draw special attention to one other important provision only—that is to s. 45. It was felt that the constitution should be sufficiently elastic to enable it to be amended from within, that is to say, amended without the necessity of a further Act of Parliament. Provision is, therefore, made in s. 45 that, after the expiry of three years from the date of the first sitting of the Assembly, the Union Government may, if a recommendatory resolution is passed by a two-thirds' majority of the members of the Assembly (twelve members), repeal or alter by proclamation any provision of the Act except the sections dealing respectively with the permanently reserved matters and the Union Government's power to legislate as mandatory, and of course the section which confers this power of amendment. The Government may not, however, act upon this recommendation until the proposals contained in it have been laid on the Table of both Houses of Parliament for one month. If during that period either House disapproves of the proposals, the Government can take no action upon them.

Before attention is drawn to the provisions of the Schedule to the Act some other provisions may be noted.

The port and settlement of Walvis Bay will be regarded (as it has been since 1922) as forming part of the territory for all purposes of the Act (s. 43), but the part of the territory jutting towards the Bechuanaland Protectorate, and known as the Caprivi Zipfel, and which under arrangement between the Union Government and the High Commissioner for South Africa is now for purposes of convenience administered by the latter, will not fall under the Constitution.

It has been pointed out that the Union Railway Board functions in the territory by reason of the provision of Act 20 of 1922. By s. 41 of the Act, the Union Railway Administration in regard to the acquisition, construction and management of the railways and harbours of the territory is enjoined to consult the Administrator or any other person designated by him in any particular case. This continues the present practice.

Although the official languages of the territory are to be as in the Union, viz. English and Dutch, s. 40 (2) enables the German language (as pointed out above) to be used in the High Court by litigants or their advocates in addressing the Court.

Some specific reference is desirable to the provisions of the Schedule to the Act. This Schedule provides for the enrolment of voters and the conduct of elections of the elective members of the Assembly.

At the first registration which was necessary before the Delimitation Commission could proceed to divide the territory into twelve constituencies, provisional lists were made in each existing magisterial district. Notices had to be published in English, Dutch and German inviting claims from persons qualified to be included in such lists. The registering officer, however, had to include in the list on his own initiative the names of those resident in his district whom he knew or believed to be qualified. This list was then to be posted in conspicuous places for five weeks, objections as well as further claims to be invited. These had to be investigated for the registering officer. As the result of his investigation he framed a complete alphabetical list for his district and transmitted both lists with the claims and objections to a person specially appointed as revising officer. Opportunity was then given, after fourteen days' notice in all three languages, for objections to be placed before the revising officer. The revising officer then held a public court for hearing further claims and objections. As the result of this hearing and his final examination of the lists the revising officer prepared the final list for the district, taking the opinion, if required by any party or of his own motion, of the Judge of the High Court on doubtful matters. The final lists so revised were to be sent to the secretary to the Administration, who, as soon as the constituencies are delimitated by the Commission, will make out a voters' roll for each constituency, eliminating the name of any person who has been registered in any district where he does not reside.

These provisions will be followed in subsequent registrations of voters, but registration will of course then proceed by constituencies and not by magisterial districts.

The provisions of the existing Electoral Act of the Union have been followed as closely as possible in regard to nominations for election, the fixing of nomination and polling days, the division of constituencies into polling districts, the fixing of polling stations, the making of electoral arrangements and generally as to the manner in which the voter will exercise his rights by secret ballot; also as to the counting of votes and the declaration of the poll.

With regard to the limits on electoral expenditure, illegal and corrupt practices and the invalidation of elections by appeal to the Court, Chapters III to VI of the Union Electoral Act as amended from time to time are to be regarded as incorporated in the Act.

Such is the Constitution. It is admittedly an experiment. If it is a successful one, the European inhabitants obtain thereby some right of self-determination. It will be possible for them to determine whether they will seek in the future representation in the Union Parliament which controls the mandatory. Any actual incorporation in the Union as a part thereof must of course depend on the view taken by the Council and Assembly of the League of Nations, which will no doubt be influenced by the safeguards proposed for the native population. When regard is had, however, to s. 45, the provisions whereof are summarized above, it seems not very likely that the Constitution will last many years in its present form, whether or not representation in the Union Parliament is sought and obtained. This Constitution seems, however, to be a necessary preliminary to any such representation; much more so to any actual incorporation of the territory in the Union if the League of Nations should at any future time so determine.

A FEW COMPARISONS BETWEEN ENGLISH AND SCOTS LAW.[1]

[*Contributed by* W. E. Dodds, Esq., *Advocate.*]

English law and Scots law are of independent growth. English common law has been evolved from Saxon customs, the feudal system of the Normans and Roman law. Other sources are ecclesiastical law and the law merchant. The development of equity and of statute law complete the ingredients of the English judicial system. Scots law is in varying degrees based upon ancient custom, the strong influences of Roman law, and ecclesiastical or canon law, while the law merchant and statute law have been important factors in its later progress.

Even after the union of the English and Scottish Parliaments in 1707 there was no attempt at a general unification of the laws. Any assimilation that has taken place has been gradual. No doubt recent inventions and the expansion of commercial enterprise have caused considerable similarity in modern commercial law, but of the older branches of law a great deal is still divergent—the result of different historical outcomes, as, for example, the law relating to land, the law of Marriage and Divorce, of Parent and Child, and the Law of Intestate Succession. The Law of Contract and of Tort, on the other hand, is very similar, allowing for certain important disparities, and the Law of Evidence is practically identical.

These outlines commence with a brief comparative survey of the Law Courts of the two countries, their procedure, and the actions or causes competent to them. Apposite reference will be made to proposals for reforms put before the Royal Commission

[1] Books of Reference:

Practice. England: *The Annual County Court Practice. The Yearly Practice of The Supreme Court.* Odgers' *Principles of Pleading and Practice* (9th edit., 1925). Scotland: Lewis on *Sheriff Court Practice* (7th edit., 1923). Maclaren's *Court of Session Practice* (1916).

Comparison. Paterson's *Compendium of English and Scotch Law* (1870—now out of print). Brodie-Innes on *Comparative Principles of the Laws of England and Scotland* (1903). Burn-Murdoch's *Notes on English Law as differing from Scots Law* (1924).

appointed at the beginning of this year to inquire into Law Court procedure in Scotland with a view to ascertaining necessary improvements or changes.

Courts and Procedure.—The Civil Courts of England and Scotland fall into two classes, Inferior and Superior.

Among the English Inferior Courts there are some of local or special jurisdiction, about which little need be said, as, with few exceptions, they are merged in the County Courts. The Mayor's Court of London (now united with the City of London Court) and the Liverpool Court of Passage are two of the best known. Similarly, in Scotland local or Burgh Courts still exist, but their civil jurisdiction is very small, being limited to the hearing of applications for summary removings.

The leading Inferior Court of England is the County Court. The County Court in its present form is the creation of modern statute, having been established by the County Court Act of 1846, the old Shire-Courts or County Courts having fallen into disuse. Each county is divided into districts, and Courts are held at each place of sitting within a district at least once every month. A County Court judge is now a barrister of not less than seven years' experience. Formerly the Shire-Courts or County Courts were presided over by the sheriff, who was an important administrative officer as well, but the sheriff's powers were gradually whittled down almost to nothing. Now the sheriff (or high-sheriff as he is often called) is mainly concerned with numerous ceremonial duties, his few administrative and judicial functions, among which is the execution of the writs of the Supreme Court, being delegated to under-sheriffs. It will be seen that the office of sheriff has had a very different development in Scotland. Other officers of the County Court are a registrar whose duty it is to issue the writs of the Court and to register its orders and judgments, and bailiffs who execute all the writs of the Court.

The Scots Sheriff Court is the equivalent of the English County Court. In order to understand fully the constitution of the Sheriff Court and its system of appeal, it is necessary to make a brief digression into the history of the sheriff.

The Sheriff.—At an early date in the history of Scotland, the sheriff dispensed justice in the Sheriff Court as the King's representative within the county. He became an important administrative official, and delegated his duties to sheriff-deputes. Sheriffdoms became hereditary and the sheriffs too powerful to be consistent

with good government. At length in 1748 heritable jurisdictions were abolished, and the sheriff-deputes were appointed by the Crown, but were not compelled to reside within their sheriffdoms, and could carry on their practice at the Bar. It then became the custom for a depute to appoint a sheriff-substitute to act during his absence, upon whom, in course of time, the judicial duties of the depute entirely devolved and the latter came to act as a Judge of Appeal from the decisions of the substitute. The designation " Sheriff-Depute " next was changed into the modern title " Sheriff " or " Sheriff-Principal." Finally in 1877 the Crown took over the appointment of the sheriff-substitutes, and thus the present system has been evolved.

The Sheriff Courts are now regulated by the Sheriff Courts Acts 1907 and 1913. Scotland is divided into sheriffdoms, each of which has a varying number of Courts according to its size. Each Court is presided over by a sheriff-substitute, who must be an advocate or law agent (*i.e.* solicitor) of five years' standing. The sheriff, as well as being a Judge of Appeal, is the King's representative in each sheriffdom and has many administrative duties. He must be an advocate of at least five years' standing and can continue in practice at the Bar. The duties of the registrar and bailiffs of the County Court are, broadly speaking, fulfilled in Scotland by the sheriff-clerk and sheriffs-officers.

County and Sheriff Courts.—In England the personal jurisdiction of the County Court roughly corresponds to that of the Sheriff Court in Scotland, and is exercised over those residing, or having a place of business, within the district or sheriffdom as the case may be, or when the cause of action has arisen therein.

With regard to subject-matter, the jurisdiction of the County Court is limited to personal actions where under £100 is claimed (but this limit may be waived by consent), a few actions concerning hereditaments and certain equitable causes, while some County Courts have jurisdiction in bankruptcy and liquidation proceedings. The Sheriff Court has more extensive powers and can entertain any actions pertaining to moveables (*i.e.* personal actions), many questions relating to the possession of heritable property, minor consistorial (*i.e.* matrimonial) causes and bankruptcy (but not liquidation) proceedings.

A County Court action is tried either by a judge alone, or in certain cases not of a Chancery nature, by a judge and a civil jury of eight persons. In the Sheriff Court, on the other hand, proof

(*i.e.* trial) is invariably before the sheriff alone, except in the one case of an action for damages by a workman against his employer under the Employer's Liability Act 1880, when jury trial is used.

Appeal.—From the County Court there is an appeal to a "Divisional Court" of the High Court of Justice consisting usually of two judges, on either an interlocutory or final order, but on a point of law or evidence only and not on a question of fact. In Scotland the law is considerably different. An appeal lies from either an interlocutory or final judgment (*i.e.* order) of the sheriff-substitute and either on fact or on law to (1) the sheriff-principal, and from him—if necessary—to the Inner House of the Court of Session or, at the appellant's option, (2) to the Inner House direct. The method of appeal from a single judge to a single judge on questions of fact and of law is unique. It has recently called forth much adverse comment, and proposals for its discontinuance, as well as for the abolition of the office of sheriff-principal, have been made before the Royal Commission. The present system, however, undoubtedly provides an expeditious and cheap form of appeal for parties who are not prepared to risk the expense of an appeal to the Court of Session.

Superior Courts.—To pass from the Inferior Courts to the Superior Courts, the Supreme Court of Judicature must next be considered, as being the Superior Court of England. It is divided into two parts, the High Court of Justice and the Court of Appeal. The High Court of Justice consists of the Chancery Division (Lord Chancellor and six justices), the King's Bench Division (Lord Chief Justice and fourteen justices), and the Probate, Divorce and Admiralty Division (President and one justice). The judges of these three divisions sit singly as judges of first instance, and any two of them sit as a "Divisional Court" to hear appeals from the County Court. The High Court goes on circuit to try civil as well as criminal cases. The Court of Appeal, like the Inner House of the Court of Session, is composed of two divisions under the presidency of the Lord Chief Justice and of the Master of the Rolls. Its judges are called Lord Justices of Appeal and are specially appointed. The Court hears appeals from the High Court, and also appeals which have come from the County Court via a Divisional Court. The Supreme Court was established by the Judicature Acts of 1873 and 1876, which united the Courts of Chancery with the Common Law Courts and the Courts of Admiralty and of Ex-

chequer, and brought about the fusion of Law and Equity by enacting that both were to be administered concurrently in the Courts of Common Law and of Equity. But the Acts reserved to the Court of Chancery those matters which were formerly exclusive to it and, generally speaking, made no change in the allocation of actions.

In Scotland Equity has been regarded somewhat differently. It has rather been inherent, and not, as in England, the outcome of different principles finding their embodiment in a separate Court exercising exclusive jurisdiction. The power to grant equitable relief is deemed to have been ingrained in the Court of Session from its foundation by virtue of its *Nobile Officium* or extraordinary jurisdiction as a Supreme Court. Thus the Scottish jurist Erskine, whose works are of great authority, says : " The Session is a court of equity as well as of law, and as such may and ought to proceed by the rules of conscience in abating the rigour of the law. . . . This power, which is called the *Nobile Officium* of the judges, is inherent in the supreme judicatory of every State, unless where separate Courts are established for law and equity, as in England. . . ." (*Institutes of the Law of Scotland*, vol. i, Title iii, 22.) This extraordinary equitable jurisdiction is exercised exclusively by the Inner House of the Court of Session as regards trusts and many matters which would be assigned to the Chancery Division in England. In addition, ordinary equitable principles (*i.e.* equitable defences, etc.) are competent in the Court of Session generally, and for some time have been held to be admissible in the Sheriff Court also.

Court of Session.—The Court of Session in Scotland takes the place of the Supreme Court of Judicature in England. Founded by Statute in 1532, it superseded previous tribunals composed of Scottish Parliamentary Committees. It sits in Edinburgh. Civil actions are not tried on circuit as in England. From time to time it has absorbed the Courts of Admiralty and of Exchequer, the Jury Court and other separate Courts. As in England, it is divided into two parts : the Outer House—which is a Court of first instance, and the Inner House—which is mainly a Court of Appeal from decisions either of the Outer House or of the sheriff or sheriff-substitute in the Sheriff Court, although in certain cases the Inner House exercises original jurisdiction. The Outer House is composed of five Lords Ordinary, each of whom, like the judges of the High Court, sit singly. The Inner House consists of eight

judges, appointed by seniority from the Outer House, and sits in two divisions, like the Court of Appeal, the Lord President and the Lord Justice-Clerk presiding. In addition, there is a separate department of the Court of Session presided over by the Junior Lord Ordinary, known as the Bill Chamber, which, both in session and in vacation, performs its specific business and acts also as the Vacation Chamber of the Court of Session. The Bill Chamber has no analogue in England, a Chancery Judge sitting in Chambers being probably the nearest equivalent. At this point it is interesting to note that among the present proposals for reform in the constitution of the Court of Session there are suggestions that an extra division of the Inner House should be formed, and that the Bill Chamber should be abolished.

Jurisdiction of Superior Courts.—The personal jurisdiction of the Superior Courts of the two countries differs in some important respects. Broadly speaking, the rules as to domicile, residence, and the *Locus* of the cause of action are alike, any one of these factors being sufficient to constitute jurisdiction in the English or Scottish Supreme Courts as the case may be. But possession of real property gives English Courts particular jurisdiction only in actions relating to that property, while the possession of heritage in Scotland sets up a general jurisdiction in all actions in the Court of Session. And no jurisdiction is created by the possession of personal property in England, but in Scotland, by means of the process known as "Arrestment to found jurisdiction," moveable property due to or belonging to a person not domiciled in Scotland is arrested in the hands of a third party in Scotland, and that person is thus brought within the jurisdiction of the Scottish Courts. [To this may be compared the now obsolete "Foreign Attachment" of the Lord Mayor's Court of London.]

Arrestment to found jurisdiction is almost peculiar to Scotland, and was borrowed from Holland. It is preliminary to, not part of, the action to be raised. Thus to obtain authority to arrest in this way, it is necessary to proceed by petition to the sheriff for a warrant, or by bill and letters of arrestment in the Bill Chamber of the Court of Session. It has been suggested to the Royal Commission that a suitable reform would be effected if the ordinary warrant to arrest, which is contained in the initial writ raising the action, were made sufficient to operate arrestment to found jurisdiction as well, thereby making that process part of the action.

Allocation of Actions.—The allocation of the various classes

of action is now regulated in England by s. 56 of the Judicature Act 1925. Thus to the Chancery Division are sent all matters relating to trusts, partnerships, the redemption of mortgages, etc., and to the King's Bench all personal actions, actions for the recovery of land and Revenue causes, while Probate, Divorce and Admiralty causes are assigned to the respective Courts of the Probate, Divorce and Admiralty Division. There is also what is popularly known as the Commercial Court, which is not a Court in the strict sense of the word but merely the result of a practical arrangement by the judges of the King's Bench Division, by which all causes deemed to be "commercial" are transferred to a "Commercial List" in charge of one of their number, thereby to be disposed of more quickly and more cheaply by means of simplified procedure. At present there is nothing in Scotland to correspond to this, a commercial cause being treated as an ordinary action; but the establishment of a Commercial Court on similar lines is another of the reforms at present under consideration.

As the Courts absorbed by the Court of Session are wholly merged in it and are not, as in England, still recognized as subordinate branches of a united Court, the distribution of business in Scotland is a much less elaborate matter. Thus, all the various classes of causes, except a few matters which are specially appropriated, are distributed indiscriminately among the five Lords Ordinary of the Outer House. Instances of appropriation are: Bill Chamber work; Exchequer causes, which usually go to the third junior Lord Ordinary; and cases demanding the exercise of the *Nobile Officium* of the Court, which are dealt with by the Inner House acting as a Court of first instances.

Procedure of Supreme Courts.—The procedure of the Supreme Courts of England and Scotland differs greatly both in form and nomenclature. An action in the King's Bench Division is generally commenced by writ upon which there is a "general" or "special indorsement." In certain cases the initial writ is an "Originating Summons," when proceedings start in Chambers and may perhaps not come into Court at all. An action in the Court of Session, on the other hand, is initiated by a Summons. There is nothing in Scotland analogous to Chamber jurisdiction: all matters must come at once into Court. In England, when the Defendant has entered appearance, the Plaintiff can take out a "Summons for Directions," and the parties appear before an officer of the Supreme Court called a Master, who thereupon decides, under right of appeal

to the judge, all preliminary questions arising in the action as to pleadings, discovery of documents, mode of trial, etc. In Scotland there is no officer corresponding to a Master. "Notice of Motion" is the equivalent to a Summons for Directions, and all preliminary matters come before, and occupy the time of, the judges in Court. English pleadings are very concise statements of fact and are usually composed of a Statement of Claim, and Defences. Sometimes in addition there is a Reply by Plaintiff and a Rejoinder by Defendant. Counterclaims may be pleaded. Facts must be admitted or explicitly denied. Contrary to Scots practice, general denials are not permitted, nor are pleas-in-law used. Scots pleadings are considerably longer and more formal, but another reform has been suggested here—that parties should have the option of consenting to an alternative form of action employing a more summary and simple procedure. At present the facts are set forth in full in the Pursuer's Condescendence which is annexed to the Summons. The defences are articulate answers to the Condescendence. Counterclaims are not allowed, though it has been recommended to the Royal Commission that they should be. There are pleas-in-law for both Pursuer and Defender. The pleadings of the two sides are embodied in a document called the Record. Before he can ask for proof (*i.e.* trial) the Pursuer is called upon to uphold the relevancy of his action, and failure to do so is fatal, the action being dismissed. This is in some ways analogous to the English "Objection in point of law"—a survival of the now abolished Demurrer—by which any preliminary point of law may be dealt with before trial by consent of the parties, or by leave of the Court on the application of one of them. The point of law raised may of course be sufficiently vital to dispose of the whole case. There are two customs peculiar to English practice which make for a saving of time and expense. First, interrogatories—lists of questions to be answered on oath—can be administered to the opposing party for the purpose of clarifying the actual dispute between the parties. And secondly, up to nine days before the trial either party can ask the other by notice to admit specified facts, and the other party will, by his refusal, incur the cost of proving what he should have admitted, even if he wins the action.

Production of Documents.—To enforce the production of documents in Court there is in Scotland a much wider power than in England. The Scots "Specification of Documents," when approved, can be used to compel persons who have nothing to do with the action

to produce documents, while in England the scope of " Discovery of Documents " is limited, as a general rule, to parties to the case.

Trial.—Trial (or proof) in both countries may be before a judge alone, a judge and jury, or a judge sitting with an assessor. In both countries, also, causes can be referred to referees, with this general difference, that in England a referee is always deemed to be an officer of Court, while in Scotland he is not and consequently in the latter case his findings are not so conclusive.

In England parties have an absolute right, which they must exercise by application, to trial by jury in pure Common Law actions, such as actions for libel, slander, breach of promise of marriage, personal injury, etc. In cases where there is an absolute right but where no application is made, and in all other cases the Court has discretion to grant or refuse jury trial. Thus in actions assigned to the Chancery Division or involving a lengthy examination of documents, jury trial is never ordered. And recent Rules of Court have had the effect of increasing the exercise of the discretionary power of the judge, and there has been a tendency to try many actions in the King's Bench Division before a judge alone. In Scotland the Court of Session Act 1850 lays down certain " enumerated causes " which are to be tried by jury. These enumerated causes are substantially the same as the actions in which, in England, parties have an absolute right to trial by jury. A later Statute provides, however, that with the consent of parties or on special cause shown, the Lord Ordinary may dispense with a jury. Both the English and Scottish Courts have therefore considerable discretionary powers. Important divergencies arise in practice. Thus actions of divorce are tried in England usually before a judge and jury, but in Scotland before a judge alone, while actions for reduction (*i.e.* setting aside) of wills are normally heard in Scotland before a judge and jury, but in England similar actions would be assigned to the Chancery Division for trial before a judge alone.

It is customary for the jury in England to return a special verdict—that is, a verdict returning findings in fact in answer to a set of questions propounded, the judge subsequently applying the law from the findings in fact before him. There are no issues as there are in Scotland. Issues may be defined as questions of fact for submission to the jury, drawn up by the parties and approved of by the Court. In Scotland, only in one instance is the special verdict to be found, namely in an action in the Sheriff Court by an employee against his employer, which has already been

spoken of as being the only action in the Sheriff Court appropriated to jury trial. With this minor exception, there is usually set forth an issue for the jury which is in most cases in the form of a general question and is called a "general issue." Under such a practice the question in dispute between the parties can be referred to the jury, who have only to say "Yes" or "No" in answer. Consequently, in certain kinds of actions, for example in an action for damages arising out of personal injury through negligence, the jury, not having to assign any reason for their answer, can disregard the logical import of the facts before them and bring in a "sympathetic verdict." If, on the other hand, it were necessary to answer a series of questions, it would be impossible to give such a verdict. For this reason the abolition of general issues is another of the reforms suggested to the Royal Commission.

Arbitration.—Many matters are both in England and in Scotland referred to arbitration. In this branch of the law a general similarity is evident, but there is considerable disparity with regard to several points of some importance. Thus the English Courts will, contrary to Scots practice, review the whole of a contract containing an arbitration clause, to decide whether or not the matter should be referred to arbitration. Broadly speaking, both in England and in Scotland an arbiter's award is final, and can only be set aside because of the arbiter's misconduct or corruption, or if he has exceeded the scope of the reference, but the English Courts will allow an appeal against an award if there is an error in law apparent on the face of it. In England an arbiter is permitted to state a case on a question of law to the Court of Appeal. In Scotland an arbiter cannot do this, but it has been strongly maintained in the recent investigations that he should have the power to do so.

Judgment.—At the conclusion of an action in England, judgment is pronounced, the successful party is said to "sign judgment" and may without any further step seek the legal enforcement of the judgment by execution. Execution is accomplished without the necessity for a formal action and is carried out by (under) sheriffs. Contrasting the procedure in Scotland, it will be seen that (1) an interlocutor equals judgment; (2) "Extract of Decree" corresponds to signing judgment; (3) this additional step must be taken—the successful party must, on his Extract of Decree, take out a Charge on Decree before he can proceed to diligence (*i.e.* execution); and (4) many of the Scottish modes of doing dili-

gence are in the form of separate actions. Thus, for example, the execution of judgment against real property is accomplished by means of a Writ of Elegit in England and in Scotland a separate action of Adjudication for Debt is necessary. The execution of personal property is carried out in England by the Writ of *Fieri Facias,* in Scotland by Poinding. Debts due by a third party to the debtor are in Scotland taken by Arrestment followed by an action of Arrestment and Furthcoming on the part of the successful creditor, while in England the corresponding process is a Garnishee Order *nisi* followed by a Garnishee Order absolute. A contingent debt or other equitable interest may be attached in England by Equitable Execution, which has no analogy in Scotland. In addition, there is in Scotland a form of diligence known as summary diligence, to which in England there is nothing exactly corresponding. An instance of this is found in the Scots bond, which contains a clause consenting to registration in the books of Court ; this clause operates as a fictitious judgment by consent and enables the creditor when necessary to proceed straight to execution. By various statutes, Bills of Exchange are placed in the same category, consent to judgment being regarded as inherent in them. The nearest equivalent in England is " summary judgment," which may be explained as follows : In certain causes, including actions on bills and cheques, a special indorsement on the writ is allowed, and this enables the plaintiff speedily to obtain judgment. In Scotland messengers-at-arms and sheriff officers perform the duties of the English sheriff.

Classification of Actions.—Having dealt with the various English and Scottish Courts, it is now proper to advert to and contrast some of the actions that can be brought in them. At the outset there is this important difference, that since the Judicature Act forms of action no longer exist in England (though in modern practice a few forms are still retained), whereas in Scotland this is not so. Forms of action in the latter country are still known, and actions are classified as Declaratory, Rescissory, Possessory and Petitory. Indeed the former division of actions in England into Real and Personal is not unknown in Scotland, having been adopted by Erskine. The term " real action," however, as applied to Scotland has a generic meaning, namely, an action which arises from a right in the thing itself, whether from a right of property or from a lesser right of servitude, etc., but in England " real action " was limited to mean an action for the recovery of land. With the one exception

mentioned in the next paragraph, real actions are now not known in English practice, but in Scotland they are of frequent occurrence.

Considering each action separately, apart from classification, it will be found that a Rescissory Action in Scotland is equivalent to an English Action for Rectification or Cancellation of a deed, while an Action of Account in England corresponds to a Count Reckoning and Payment in Scotland. There are declaratory actions in each country, though they are more extensively used in Scotland. The Scots Petitory Action is a comprehensive term and includes all actions for debt or damages or for specific performance. The English action for the recovery of land is equivalent to the Scottish action of removing. The only form of real action in England is an Admiralty action *in rem*. There is a similar action in Scotland but with more complicated procedure, and the Royal Commission has been asked to recommend the adoption of equally simple procedure to that in use in England.

The Scots action of Multiplepoinding, to which there is nothing precisely similar in England, is plastic and of great scope. It is available whenever two or more parties are in dispute as to their claims to a fund in the hands of an impartial third person or when trustees are in difficulty as to the distribution of the trust funds to the beneficiaries. The action can be raised by the holder of the fund *in medio*, as it is called, or by any of the claimants. The English " Stakeholder's Interpleader " bears the nearest resemblance to a Multiplepoinding. It is available to a defendant only and is used in the following circumstances : A is the holder of goods or moneys but has no interest in them (except in respect of charges or costs). A is being sued for them ; the moneys or goods are also claimed by a third party. A can *then* take out an interpleader summons to divert the action from himself and to cause the rival claimants to contest their claims. There is also an analogous proceeding known as Sheriff's Interpleader. In circumstances unsuitable for an interpleader a litigant, who could still raise a Multiplepoinding in Scotland, would have to proceed in England by an Administration Suit or by a Petition under the Trustee Acts.

Conversely, there are proceedings in England for which no Scottish equivalent is found. For example, the Administration Suit just mentioned, while being available for trustees in that particular class of problem which would in Scotland warrant a Multiplepoinding, is of wide extent and is open to any trustee,

creditor, beneficiary, etc., who desires a ruling by the Court on any of the multitudinous questions relating to trusts. Such assistance is at present outside the province of the Courts in Scotland and cannot be given, although it should be observed that recommendations have been put before the Royal Commission for the introduction of an "Action for Direction of Trustees."

Third Party Notice.—Again, Third Party Notice is a proceeding peculiar to England, generally on the lines of an Interpleader Summons. When a defendant sets out that he is entitled to a contribution or indemnity from a third person who is not a party to the action, he may, with the leave of the Court, issue a Third Party Notice against him. The third party must then appear and can defend the action, or counterclaim against the plaintiff, and is in every way bound by the decision of the Court. The adoption of Third Party Notice has also been proposed to the Royal Commission.

THE NEW CIVIL LAW OF THE PRINCIPALITY OF LIECHTENSTEIN.

(Law of Property (Sachenrecht) and of Persons and Corporations (Personen- und Gesellschaftsrecht.)

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Introductory.—The Principality of Liechtenstein has an area of 159 square kilometres and a population of 10,000 inhabitants. It contains eleven small towns and villages, none of them exceeding 1,400 inhabitants, besides which there are hamlets, manors and farms. It is situated on the border of the Upper Rhine between Austria and Switzerland, bordering on the Cantons of St. Gall and Grisons.

The Prince of Liechtenstein resides mostly in Vienna or on his estates outside the country. He has a representative at Vaduz who is Chief of Government (*Regierungschef*) and is elected by the Prince upon presentation by the Diet. Liechtenstein is now a constitutional principality, the centre of gravitation of which has become, since 1921, a Diet of fifteen deputies elected by the people. The Government, Chief and two members, are responsible to both Prince and Diet. The Progressive Party (*Volkspartei*), which brought about the changes after the World War, has remained in power since then and has only lately (in April 1926) been confirmed in majority by a popular vote. Under the rule of this Progressive Party the legislation of Liechtenstein, which had always been under the sway of Austrian legislation, has been considerably modernized. Both the Leader of the Diet (*Landtagspräsident*) and the only diplomatic agent of the principality, the Chargé d'Affaires of Liechtenstein at Berne, are jurists, the latter a lecturer on International Law at Berne University. It is to these two lawyers (Dr. Wilhelm Beck, of Vaduz, and Dr. Emil Beck, of Berne) that the legal changes are due to a considerable extent. In its international relations the principality has been brought into near contact with the Swiss Confederation. It has now a Postal Union and a Customs Union with Switzerland. But the jurists of the

small principality had their eyes also on the development of private law. A revised Law of Property has been enacted in 1922, a new Law of Persons and Corporations with additional provisions on cognate subjects has been enacted by the Diet on November 5, 1925, and ratified by the Prince on January 20, 1926. It has been published in the gazette of the principality on February 19, 1926. As may be inferred from the aforesaid, the draftsmen of this law are the above-mentioned jurists. The new law (which will be cited under the abbreviated official title P.G.R. = *Personen- und Gesellschaftsrecht* = Law of Persons and Corporations) is a most interesting feat of draftsmanship. In its first part, the Law of Natural Persons, it follows closely the Swiss Civil Code. In its second part, the Law of Corporations, including several other subjects, such as the use of firm names, the law of accounting, trusts and trustees, homesteads and an introductory law which contains a number of urgent reforms on other subjects, it is eclectic, drawing not only on the Swiss Civil Code, but on the old Austrian Commercial Code of 1865, which was formerly also in use in Germany, on the new German Commercial Code, on recent laws of Germany, Austria, France, on the laws on Trusts and Trustees of England and America and on modern proposals in International Private Law. The draftsmen of the P.G.R. had an unusual advantage. They were not hampered by the fact that their proposals contradicted the jurisprudence of the courts, nor by the factious objections of a parliamentary opposition. They could simply do what they considered best, and in that respect their new law is a unique experiment. They are perfectly aware of this. In a "Short Report on the Law of Persons and Corporations" (*Kurzer Bericht zum Personen- und Gesellschaftsrecht*) which was issued to the Diet, they observe notably with respect to corporations:

> The present bill, which in spite of its condensation is bulky, intends to introduce in this country, systematically co-ordinated, all and every legal form of enterprise known and tested in foreign legislation, whether contained in a special law or in a code, as far as practically useful. If one compares with this code the respective laws and by-laws of other countries, such as the German Reich or of Austria, one will find that the bulky material has been confined in a narrow compass.

Now as to the extent of this condensation, one may be of a different opinion. Considering that the private law of Liechtenstein is derived to a considerable extent from the Swiss Civil Code, it has added much to the bulk of that legislation. The Swiss Civil Code,

including the law of persons, husband and wife, parents and children, guardianship, successions, and property law, contains 977 articles, plus 63 sections of introductory laws partly of temporary use. To these must, however, be added the law of Obligations, containing 165 articles of Corporation law. The Law of Property (*Sachenrecht* = S.R.) of Liechtenstein, containing also a short chapter on Mining Laws and the law concerning Water Power, comprises 632 sections, to which must be added a chapter on Introductory Law. The P.G.R. comprises 1,066 sections, and a chapter on Introductory Laws, which, however, contains a number of miscellaneous enactments belonging partly to commercial law and partly to public law. Thus the bulk of the Liechtenstein law is considerable and will become more so, when the family law, the law of inheritance, and the law of contract have been likewise modernized and codified. The private law of Liechtenstein will then have certainly not less than some 3,500 sections, some of them of considerable length. The advantage of the Liechtenstein system is, however, that almost everything which comes under the head of a particular chapter of the law, whether being a principle of law or a by-law, or whether under other systems it might be incorporated in a supplementary law or a schedule, is inserted continuously. Thus in the Law of Property. The *Sachenrecht* (S.R.) is in its chief part a nearly verbal copy of the Law of Property of the Swiss Civil Code (hereafter S.C.C.), except for the chapters on Bonds secured on Land, which is adapted to the special needs of the country, it being reserved for the Land Savings Bank (*Landessparkasse*) to issue such bonds, further the chapters on Mining Law (which in many respects has been based on the Mining Law of 1919 of the adjoining Swiss Canton of St. Gall) and on Water Power. Now in Swiss law many provisions are left to the care of the Cantons and therefore all the Cantons have special Introductory Laws to the Civil Code.[1] These laws differ in several points of secondary importance, and especially as to procedure, which in Switzerland depends on the Cantons. Liechtenstein had no such reasons for leaving special features to further legislation, and inserted them into its S.R. The draftsmen of the law have adapted these matters chiefly from the Introductory Law of the

[1] Cf. Ivy Williams, D.C.L., LL.D. *The Sources of Law in the Swiss Civil Code.* Oxford 1923, p. 15. Wherever in this paper translations of special Liechtenstein (or Swiss) legal expressions are given, they are taken, if nothing else is said, from the excellent *English Version of the Swiss Civil Code*, by Dr. Williams, Oxford University Press, 1925.

adjacent Canton of St. Gall, which in its part bordering on Liechtenstein has much the same population and the same habits as Liechtenstein. Thus S.R. 84 provides for the *Jus vicinorum*, that an owner of land has the right to cut and keep overhanging branches which damage his land. This is s. 687 of the S.C.C. The following section (85) S.R. determines the distance from the bordering piece of land, within which several sorts of plants must be kept. This section is not contained in the S.C.C., but is copied in part from s. 129 of the St. Gall law of introduction. Similarly s. 97 S.R. referring to conduits of water, gas and electricity over another's land is identical with s. 693 S.C.C., while s. 98 S.R. is identical with s. 134 St. Gall L. of I. Similar interweavings can be observed in the P.G.R.

In two respects the S.R. of Liechtenstein differs considerably from the Swiss law. The S.R. (but also the P.G.R.) gives clear rules as to Private International Law, while the S.C.C. does not. As to Property, whether real or personal, the *lex rei sitae* is decisive, determining whether a thing is to be considered a moveable or an immoveable (s. 10), as to the right of property in it or limited rights *in rem* to it (s. 11), as to the necessary form of conveyances and agreements (s. 12), as to adverse possession (*Ersitzung*) (s. 14), as to the necessary publicity for creating rights against third parties (s. 15), as to the nature of ownership and limited rights *in rem* (s. 16), as to possession (s. 18), as to acquisition and loss of ownership or limited property rights in moveables (s. 13, al. 1), while debts and other rights can be pledged according to the law in use at the residence of the debtor. A personal obligation to transfer ownership or to create a limited right *in rem* is subject to the law of the place of fulfilment. This place again is in case of doubt the place where the thing was situated at the time of conclusion of the agreement. As to the form of the obligation it is sufficient that either the law of the place of contracting or the law of the situation of the thing be observed (s. 17). The second difference between S.R. and S.C.C. consists in the form of the contract of sale of land. According to S.C.C., a contract for the transfer of ownership of land is void unless made by a duly authenticated instrument (s. 656, al. 1), while according to S.R. agreements of sale, and other agreements concerning land, are valid if in writing (s. 37), and the conveyance only must be made through an entry in the land register.

Law of Persons and Corporations. Introductory Remarks.—This

part of the Liechtenstein law (P.G.R.) shows the most marked advance over the former Austrian law. It is generally admitted that the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*) of 1811 was an achievement. It is further admitted that the Austrian Commercial Code, being the old code of the German Confederation, was excellent. However, the former is heavy and old-fashioned in its language, and very poor in its Law of Persons. The latter had been reformed in Germany in 1898, and numerous amendments (*Novellen*) have been added to both in Austria, but not in Liechtenstein. Liechtenstein had, *e.g.*, no law as to co-operative societies, but it had such societies, and it had no adequate laws as to other corporate persons. Thus a revision of some kind imposed itself, and instead of the amending-system, the legislators chose the system of reception and codification. As a model they chose the Swiss Civil Code also with respect to their law of persons, while they went beyond it in their Corporation and Trust Law.

Law of Persons.—As far as natural persons are concerned, there is very little difference between Swiss and Liechtenstein law, and we may refer to the excellent edition of the S.C.C. by Dr. Ivy Williams. There are, however, some interesting deviations. First of all the Liechtenstein law is often more explicit than the Swiss. While, according to Dr. Williams, "the provisions (of the Swiss Code) are put so concisely and with such a paucity of detail, that a great deal of work is left to the judge to complete the Code,"[1] this is scarcely so in the P.G.R. An example will show it. The S.C.C. grants the following protection to the integrity of the personality: Art. 28[2]: Where any one is being injured in his person or reputation ["*in seinen persönlichen Verhältnissen*" might also be translated, "in his personal standing"—Wyler] by another's unlawful act, he can apply to the judge for an injunction to restrain the continuation of that act. An action for damages or for the payment of a sum of money by way of moral compensation [or reparation, Wyler] can be brought only in special cases provided by law.

This section has been enlarged in the P.G.R. as follows:

Art. 39: Where any one by another's unlawful act is injured in his personal standing (assets of personality), as, for instance, in his bodily or mental integrity, in his honour, his credit, the peace of his home, in his liberty, his name, his coat of arms, house-token

[1] Williams, *Sources of Law*, p. 27. [2] Miss Williams's version.

and similar tokens, in his right to his own picture, in his correspondence, business and similar relations, and generally in his claim to esteem and respect for his personality, except as to such assets of personality like copyright, patent rights and so on, which are provided for by special laws, and in as far as the protection of such rights is compatible with the interests of other people (*der Mitmenschen*) he [*i.e.* the injured party—Wyler] can apply to the judge for a finding of the facts, for an injunction in restraint of that act, restoration of the former conditions by revocation, etc., and an injunction for the restraint of continuation of that act, without being obliged to prove that the said act has been done maliciously.

In cases in which damage has been done the judge may, moreover, for avoidance of future injuries, by a judgment or an equivalent, like an injunction, impose [on the perpetrator of the said act, Wyler] an adequate security by such means as are provided for the execution of judgments. The application for restraining an act can also be brought when the act, the restraint of which is being applied for, falls under penal law.

In all such cases protective measures can be taken in summary procedure before beginning a law-suit.

Art. 40 : Where any one is being injured in his personal standing by another's unlawful act, he has, moreover, a claim to damages if the other person has acted maliciously. An action for the payment of a sum of money by way of reparation can be brought only in special cases provided by law, unless it be otherwise justified through the special gravity of the injury, such as the special value of the object of attack, the force of the attack or other like reason.

Instead of or beside these payments, the judge may in cases of malicious wrongdoing decree another kind of reparation, such as a declaration of honour in the judgment, publication of the judgment at the costs of the wrongdoer, payment of a sum of money towards a charitable foundation or institution or into a fund for the benefit of the poor to be named by the injured party, or in a similar way.

These sections show at the same time the ample fashion in which these personal rights have been worked out in the P.G.R., and the realistic sense of the legislator. In many of the other parts of this law, the P.G.R. refers to summary procedure by injunction, judicial decree, direct command, etc., which procedure, under the name of *Rechtsfürsorgeverfahren* has been established

in a special law enacted in 1922 (*Landesgesetzblatt* Nr. 19) and in an Ordinance to secure the execution of claims (*Rechtssicherungsordnung*) of 1923 (*Landesgesetzblatt* Nr. 8).

No doubt, this procedure by direct command of the judge may often prevent a long law-suit, and its necessity is being felt in countries where actions can only be brought in the ordinary devious and expensive way.

Law of Corporations.—This part of the Liechtenstein P.G.R. is the most elaborate of the code, and has the advantage over Swiss law that it legislates on the whole complex of corporate bodies, whether of civil or of commercial law. While the S.C.C. has only eight short sections of General Provisions concerning corporate bodies, the P.G.R. has not less than 139 sections. The first of these (s. 106) says that joint bodies organized as Corporations of several kinds and Establishments or Foundations, obtain recognition as "Juristic Persons" (*i.e.* the status as a person at law)[1] by registration in the Register of Publicity (*Oeffentlichkeitsregister*).[2] As in Swiss law, publication is not necessary for Corporations of Public Law, for Societies (Associations of non-commercial purpose), for Family Foundations, Church Foundations, etc. Associations of persons for business purposes can obtain the status of a person only if organized as Business Corporations or as "Establishments" (*Anstalten*) (s. 107). Except in a few cases there is no minimum number of persons required to form a corporation. Neither do provisions exist as to a minimum capital. The general provisions of this chapter contain general rules on the formation, organization and winding up of corporations. A modern feature is the procedure of nullification (*Vernichtbarkeitsklage*) in cases in which the articles of association (*Statuten*) do not contain such provisions as are material for the special form of corporation. This procedure can, however, be avoided by removal of the imperfections (s. 125 ff.). As in other chapters, the P.G.R. also rules in a clear way the International Private Law of Corporations (s. 232–243). It follows the doctrine of the seat of a corporation. A corporate body is to be considered a home or a foreign corporation according as to whether its seat is within or without the country, independent of the nationality of the members or of the corporate

[1] Williams's version, *cf.* p. 12, note and s. 52, S.C.C.

[2] The register of publicity takes the place of the former Trade Register and contains besides Corporations also entries as to Foundations, Trusts, Matrimonial Property Law, etc. It can be used for other purposes to be determined from time to time by the Government.

organs, or of the place of formation or of the location of its funds (s. 232). The seat of a corporate body is within the country, if the corporation has the centre of its administrative activity within the country, or if it does its work chiefly in the country, or in some other formal events (s. 233). A foreign corporation can become a home corporation with the consent of the Court (*Landgericht*) by being entered in the Register of Publicity, and where required by appointing a representative in the country, without a winding-up in the foreign country and a new formation in the home country, even without changing the location of its business or its board of directors or management, provided only that its articles of association are consistent with home law. The simple transfer of the seat of a home corporation into a foreign country without a winding-up is, on the other hand, only admissible with the consent of the Government (s. 234). The capacity to have rights and duties and to effect legal transactions,[1] including the capacity to be subject to the penal laws (*Deliktsfähigkeit*), depends with all corporations on the law of their chief seat (s. 235). The P.G.R. rules the formation, changes and winding-up of branch offices of foreign corporations in the country (s. 236, al. 1). An interesting protectionist measure is contained in s. 238 :

> The acceptance of gifts within the country, such as donations, bequests, etc., to an amount above 5,000 francs[2] and the acquisition of land within the country, if the total measurement exceeds the measure admissible for a homestead [as regulated in chap. xiv of P.G.R.—Wyler] by a corporation governed by this law requires for its validity the consent of the Government. This provision applies also to foreign corporations governed by public law.

The marginal note, " Restriction of Mortmain," shows the special purpose of this section. While the P.G.R. shows a marked tendency to welcome foreign enterprises of every kind, its s. 239 provides that foreign corporations and branch offices of foreign corporations, the managers or directors of which are as to the majority foreigners or foreign firms, must appoint a resident citizen of Liechtenstein as representative or confidential clerk (*Prokurist*). The same rule applies to foreign Insurance Companies, which intend to work in the country even though they are provided with a special licence.

Special Corporation Law.—The P.G.R. is very rich in corporate forms. Its basic form is the " Society " (*Verein*), *i.e.* an association

[1] Nomenclature of Dr. Williams's versions, s. 11, 12.

[2] The Liechtenstein franc is at par with the Swiss franc.

of persons for any purpose except for the exclusive carrying on of a business. Contrary to the Swiss form of the society, in which the general assembly of members is the highest organ of the corporate body (S.C.C., s. 64), any Liechtenstein corporation and thus also a society can have a highest organ by delegation of the members (ss. 166, 246). According to s. 260 the rules provided for societies are to be applied to all other corporate bodies, unless this be excluded by their special constitution or by law.

The Limited Company.—The Limited Company (ss. 261–367) appears in two forms, which however are not identical with the two English forms (by shares and by guarantee), but have a certain likeness to them in so far as in one form the share capital is divided up into shares of a certain nominal value, while in the other, the capital is divided in a number of parts, which may differ between themselves. There may be preference shares, gratis shares, profit-sharing certificates (*Genussaktien*), workmen's shares, convertible bonds. It is possible to create companies with variable share capital.

The Limited-Partnership-Company (*Kommanditaktiengesellschaft*) (ss. 368–74) is a company known in Swiss and German law, where one or more partners are liable with all their property, while a further capital is divided into shares, the owners of which are not personally liable. While in German and Swiss law the partners whose liability is unlimited are *ex officio* directors of the company, the P.G.R. provides that by articles of association the management can be entrusted to third parties.

The Company limited by parts (*Anteilsgesellschaft*) (ss. 375–88) resembles those companies known in several legal systems, which have no fixed capital, and which are sometimes formed for mining purposes (*Gewerkschaften auf Kuxen*).

Partnership with Limited Liability.—("Limited Partnerships" = *Gesellschaft mit beschränkter Haftung* (shortly referred to as G.m.b.H.). By ss. 389–427 a Partnership with Limited Liability has been created. The "Report" says that this corporation (which is not a partnership in the English sense, but a Juristic Person, that takes existence only by being entered in the Register of Publicity, s. 390) derives from English law, but this is probably an error. This *Gesellschaft mit beschränkter Haftung* is not identical with or nearly related to the Limited Partnership of the Act of 1907 (7 Edw. 7, c. 24), for its chief tenet is that the liability of all members is limited to a certain, although possibly different amount. Nor

is it related to the Company limited by Guarantee of the Companies Act 1908 (8 Edw. 7, c. 69). It is however a characteristic of Liechtenstein law to be liberal, and thus the Partnership with Limited Liability can by memorandum of association provide that stock certificates be given out for the several shares, thus nearly transforming the Partnership into a stock corporation (s. 409), or that beside the partners with limited liability there are one or more General Partners, in which case the corporation comes very near the Limited Partnership of English law. But this is the exception, for which only one section (426) stands. The ordinary system is that of the German G.m.b.H., combined with the Swiss draft-law on Companies. There is no minimum capital required for the G.m.b.H., except that one share shall not be less than 50 francs. The maximum membership shall not exceed 30 (s. 389). Members are liable for their own shares, and jointly and severally for all debts of the Corporation up to the unpaid total amount of capital (s. 415). Shares which are not being paid up can be cancelled for the benefit of the corporation (s. 411). There are elaborate provisions for the transformation of a Limited Company into a Limited Partnership (s. 425).

Co-operative Associations.—Co-operative Associations (*Genossenschaften*) (ss. 428–95) are extensively regulated. Under the former law there existed "concessioned" (licensed) associations, but without legal provisions for their management. The law distinguishes between associations which must be listed in the Trade Register, and others, smaller bodies, especially for rural conditions and purposes, which need not be entered there. As to the liability of the participants, the provision of the Swiss law, that unlimited liability is the rule, has been changed and the liability of members is unlimited only if this has been provided by the articles of association (s. 460). The P.G.R. also legislates on Mutual Life Assurance Societies and Small Collecting Societies (*Versicherungsvereine auf Gegenseitigkeit und Hilfskassen*) (ss. 496–533). The former need a government charter or licence, the latter are placed only under special rules as to book-keeping and investment of funds.

A further part (6th) provides for Establishments and Foundations. It is fuller than the S.C.C., but does not vary greatly from it.

A seventh part legislates on Special Forms and Kinds of Enterprises. This long part (ss. 571–648) shows a great variety of forms of corporate bodies, which can only be enumerated here.

These are: Enterprises of Corporations of Public Utility (*Gemeinwirtschaftliche Unternehmungen*) comprising Corporations of Public Utility and Establishments of Public Utility, Mortgage Companies and Licensed Insurance Enterprises (the former specially for the Issue of Mortgages on foreign estates), Trust Corporations (comprising Trust Companies for the purposes of Auditing and Accounting and ordinary legal Trust business, and Finance Trusts). These sections have been framed with an eye on American legislation. There is further some, probably more curious than needful, legislation on Compound Corporations (*Gesamtverbände*) and Incorporated Divisions (*Abteilungsverbandspersonen*) (ss. 616–28). A very interesting feature consists in corporations under foreign law (*Besondere Verbandspersonen unter ausländischem Recht*) (ss. 629–32), and Licensed Foreign Corporations (ss. 633–36). In spite of its great liberality in the formation of corporate bodies, the P.G.R. foresees the possibility that foreign firms or corporations might wish to establish within the country companies under foreign law, and this is possible with a very few reserves as to home law.

One-Man-Corporations.—One-Man-Corporations (*Einmannverbandspersonen*) or One-Hand-Companies (*Einhandsgesellschaften*) (ss. 637–46), would seem to be an ideal instrument for people desirous of playing the "lone hand." It is an undeniable fact that in countries which allow the formation of private companies by a few people (down to two), the formation of One-Man-Companies can be prevented only *de jure*, but not *de facto*. Where companies can be formed by two persons, shares are apt to become united in one hand, and those provisions which tend to make the formation of one-man-companies unlawful, have the undesirable effect of creating dummy shareholders. Liechtenstein has recognized this, and has boldly admitted One-Man-Corporations. These can even have different forms, such as that of a Limited Company, of a Participation Company, or of a One-Man-Limited Partnership-Company (*Einmanngesellschaft mit beschränkter Haftung*). Beside these company forms, the P.G.R. puts at the disposal of small business people a further form, that of the One-Man-Enterprise with limited liability, by which a person may start an enterprise, not in company form, with a certain limited capital, which is to be entered in the Publicity Register, thus, except as to cases of Tort, freeing the party from unlimited liability (ss. 834–96). For the protection of creditors quite a number of provisions have been formulated. It will be very interesting to learn what will be the results, if any, of this legislative venture. It

cannot be denied that the idea of a limited liability, without engaging one's whole estate and future, may be tempting to many a smaller business man. In two sections the P.G.R. creates another almost "fancy" form of corporation, the "Establishment-like-Corporation" (*Anstaltsähnliche Körperschaft*). A corporation can be formed without any members at all, provided it has a Board of Directors (*Verwaltung*), by-laws, which provide for its working and possibly the future transformation of its purposes, and an Estate (*Vermögen*); and similarly, if a Corporation, *i.e.* the supreme organ of it, possibly the Board of Directors, has bought all shares so as to discharge all the liabilities of a Corporation, the same can continue in existence as a Corporation (ss. 647, 648). This kind of corporation has a certain resemblance to a Foundation or an Establishment, and in some cases is to be treated like a One-Man-Corporation.

Companies without the Status of a Person.—(Partnerships) (*Die Gesellschaften ohne Persönlichkeit. Personenähnliche Gemeinschaften*). Of these different forms of partnership the P.G.R. again enumerates and regulates several types.

There is firstly the "simple partnership" (ss. 680–88), a form which will come into action only when no other form of partnership has been chosen, but will sometimes be applied to communities of interest, participations, etc. Then there are the two forms known in most Continental legislations as "*société collective*" (*Kollektivgesellschaft*) and "*société en commandite*" (*Kommanditgesellschaft*), (ss. 689–754). The P.G.R. requires a written agreement for the formation of either partnership and its entry in the Publicity Register. In s. 749, al. 3, a special form of the *Kommandite* is mentioned, the Trust Kommandite, and further two variations of the said partnerships, the collective partnership with limited liability and the *Kommanditistengesellschaft* (so called in the Report) or *Kommanditärengesellschaft*, which is also practically a partnership of limited parts, not of persons.

There is further the "partnership of opportunity" (*Gelegenheitsgesellschaft*), *i.e.* partnership for a short or special purpose, such as the issue of a loan, promotion of a company, etc. (ss. 756–67), then the "silent partnership" (*Stille Gesellschaft*) (ss. 768–78), where again we find a distinction between this form of partnership, being a profit-sharing contrivance, and the silent participation in the business of a person not listed in the Publicity Register, wherewith may be coupled a guarantee in favour of a third party (s. 768).

The next partnership is the Community of Property [1] (*Gemeinderschaft*), a strict family partnership (ss. 779–93), consisting as to property of an Estate derived from a common relation (*Erblasser, de cujus*), and regulated in Swiss law under the laws of succession.

In a further part of the P.G.R. we find special forms of Estates: the Homestead and the Entailed Property (*Fideikommiss*). The Homestead seems to be a legal institution which thrives better out of Europe; in Switzerland at least, which has incorporated it into its Civil Code (S.C.C. 350–59), it has hitherto met with no success at all. Perhaps fourteen years are a short time for a code, but they have shown the trend of things in most other parts of the law. Liechtenstein has a second form of Homestead not known in Swiss law, that established not by the owner, but by a third party, such as a municipality, a firm, etc. (*Ausgeberheimstätten*). A more interesting legal form is the Estate in tail (*Fideikommiss*) of the P.G.R. (ss. 829–33), which is derived in part from the Swiss "Family property" of S.C.C. 335, but in its other form, the real estate in tail, is expressly forbidden in Swiss law, and expressly introduced in the P.G.R. in order to strengthen the idea of Property (Report, p. 47). The P.G.R. takes care, however, that the mortmain shall not be facilitated by entailing real estate, and therefore real estate in the country shall not be entailed as *Fideikommiss* to a larger extent than sufficient for the upkeep of five persons, and only with the consent of the Government (s. 829). Generally, and unless other provisions are contained in the law or in the Deed of Feoffment or in a by-law, estates in tail shall be under the law of implied trust. This leads to the last of the important chapters of this new law, that on Trusts.

Law of Trusts.—The Law of Trusts (*Treuhänderschaft*) (or as it is named in a sub-title by an old-fashioned germanic word: *das Salmannenrecht*, has been incorporated in thirty-five sections, ss. 897–932, and has been based on English and American law, but as these are founded on the Common Law, while the P.G.R. derives from the Civil Law and Germanic Laws, it had to be adapted to the general system of Liechtenstein law.

Trust and Trustee are defined by ss. 897–8 as follows:

S. 897. The Express Trust, Trust-Relations. Trustee (*Treuhänder oder Salmann*) in the sense of this law is a natural person (*Einzelperson*), firm or corporation, to which another person (the cestui que trust) [= *Treugeber*] hands over an estate or something of money value [*Ver-*

[1] Translation of Dr. Williams (S.C.C. 336).

mögenswert] or a right, as object of trust [*Treugut*] with the obligation of managing or using this object in his own name as holder [*selbständiger Rechtsträger*] as against everybody (with or without giving security to the cestui que trust or to a third party (as, for instance, by guarantee) in favour of one or more third parties (beneficiaries), as, for instance, in the case of a foundation *inter vivos*, establishments dependent from others, bonds with express trust security of interests, of repayment, etc.

To the Beneficiaries of a Trust-relation (*Trust, Treuhand, treue Hand*) may also belong the Cestui que trust, as for instance when a last will mentions conditions in favour of the decedent to be carried out after his death, but not exclusively by the Trustee. Unless otherwise provided, the provisions of this chapter do not apply to Foundations and dependent establishments for Church or Public purposes. Provided that nothing in this chapter shall invalidate the provisions against immoral, illegal and fictitious transactions and those concerning circumventions of the law.

This rather long section gives on the one hand the essentials of a trust according to P.G.R., *i.e.* a cestui que trust as being the donor of the trust matter, a trustee as carrying out the object of the trust, and a third party being the beneficiary of the trust, and on the other hand it tries also to give some special features, such as the possibility of requiring security from the trustee, and some cases, where trusts might become operative.

S. 898. The Silent Trusteeship, Implied Trust.—Wherever any one through act of law or disposition of an authority or otherwise, without having been appointed expressly as a trustee, holds assets or rights of another in his own name, but to the benefit of the former owner or of a third party, the connexion between himself and the third party is to be considered as a silent trusteeship, as *e.g.* the legal position of one or several collectors of contributions of the public for charitable, or public utility purposes or the like. Where the law does not contain special provisions for such trust-relations (as *e.g.* for the representative to be named for the issue of Bonds secured by mortgage and for Trustees of the community of creditors of Loan-Bonds, for the Trustee of mortgage-certificates, for Executors, Agents, Commission-agents (*Fideicommissaries*) and where nothing else appears from the special circumstances, the provisions referring to express trusts, especially those as to the position of the trust fund in case of execution for debts and in bankruptcy will be applied to the relations between the Detentor of the estate or right and the third party.

According to s. 899 an Express Trust can be established by a written agreement or by deed (*Treuhandbrief*) or by will or by the articles of association of a corporation or a firm. S. 900 provides that trusts established by agreement or deed signed by cestui que trust and trustee shall be entered in the Publicity Register,

but the trust-deed can provide that this shall not be done. The registrar can moreover abstain from publishing lesser trusts. According to s. 901 the entry in the Publicity Register can be dispensed with, if the trust is of a passing nature, such as for liquidation purposes, moreover, where the trust fund has been entered in the register for other purposes (*e.g.* if it consists of the assets of a corporation which is already listed). S. 902 contains a provision important under bankruptcy law: the non-entry of a trust does not invalidate it on principle, but where questions of preference can come up, the agreement or transaction will in case of doubt be considered voidable, and it is for the party deriving claims from it to prove the date of its making. The following sections provide for the working of the trust in case of non-acceptance of a trusteeship, retirement or removal of trustees. A trustee who has been appointed without his consent can refuse to act. He is considered to have refused, if he has accepted on conditions contrary to the trust deed (s. 903). If the trust deed has not named a trustee in a sufficient way, or if a trustee refuses to act or retires or has to be removed, a Judicial Trustee will be named by decree (*Rechtsfürsorgeverfahren*) in summary procedure. As a Judicial Trustee shall as a rule be appointed the Liechtenstein Chartered Bank (*Landesbank*), otherwise only subjects of Liechtenstein who can fulfil the necessary conditions. In cases where a Public Trustee is to be appointed (these cases are not set out), the Public Trustee shall be the Landesbank (s. 904). Where the object of the trust consists in managing or administering property or participations, a trustee may be a foreigner living outside Liechtenstein. But if the object is another one [*e.g.* the care of persons combined with the care of their property—Wyler] the foreign trustee or the Liechtenstein Trustee living outside Liechtenstein shall be represented in the country as in the case of foreign corporations (see above, ad. s. 239). Where there are several co-trustees, at least one of them shall live in the country, or a representative shall be named in the country, as above (s. 905). A trust can be determined by operation of law in similar cases as a foundation. The trustee who shall not have been dispensed from rendering accounts, shall render them during and on the determination of his office.

If upon determination of a trusteeship the trust deed does not say in which way the trust fund shall be dealt with, the trustee shall transfer it to the cestui que trust or his executors, administrators or assigns, and failing such, to the beneficiary legally entitled

to it, and eventually, if there is no residuary beneficiary in existence, to a foundation with a nearly similar object to that of the trust. In cases of doubt it would appear that the judge (*Landgericht*) will decree what shall be done with the trust fund.

The trustee who has accepted a trust, has to carry it out, at least for one year, unless the trust deed or agreement provides differently. As a rule, the trustee who has carried out his trust for one year, can give a three months' notice of it at the end of each calendar year. Unless the trust agreement or deed provide otherwise, or a cestui que trust exist at the time of the notice, the notice can be given to the registrar of Publicity Register. If the succession in the trusteeship has been provided for, the registrar gives notice to the next appointed or appointable trustee, and if no other trustee has been provided for, to the Court (*Landgericht*), which will proceed to the appointment of another trustee as in other cases (s. 908). In case of death of a trustee, or if he becomes incapable (*handlungsunfähig*), his personal representative has to inform the Court. Bankruptcy of a trustee does not make a trustee incapable to carry out the trust, unless the trust fund be in danger, but the judge can appoint a co-trustee (s. 910). The contents of the trust deed or trust agreement are paramount for the interpretation of the trust. If the contents of such deed or agreement are in conflict with provisions of strict law or public order, the trust shall not be void, but shall be interpreted in such a way as to be in accordance with Liechtenstein law, unless it shall be avoided by the deed itself. The following sections of the P.G.R. shall only apply to such trusts which have made no special provisions by deed of agreement (s. 910). The P.G.R. defines a trust fund as the complex of all assets which belong to a trust, either by being brought into it by the cestui que trust or by a trustee, or whether they belonged to it originally or have been replaced, including claims for the loss of certain objects (s. 911). The P.G.R. has tried to copy certain provisions of English trust law as to Trust Investments. Thus, unless the trust deed or agreements provide otherwise, a trustee shall be entitled to invest trust moneys in the Liechtenstein Chartered Bank or in bonds issued by the same, or in public bonds of the country or of municipalities. The investment in landed estate or in private enterprises shall be lawful if admitted by the deed or by the Court. It is likewise necessary to obtain the consent of the Court for investment in foreign securities. This policy shall, however, not be applied to trusts which manage

property belonging to persons who have their residence or to firms and companies which are established outside the country (s. 913). A most important and adequate ruling has been found for the avoidance of losses in case of seizure against or bankruptcy of the trustee. It is expressly said (s. 915) that the trust fund shall be considered as "third man's property" (*Fremdvermögen*). It shall be separated at once from the private property of the debtor, and shall (at least for the time being) be transferred to a judicial trustee. In case of need the Court shall carry out the separation of assets. In as far as the trust assets cannot be separated from the debtor's other property, the claim of the cestui que trust or the beneficiary of the trust fund is privileged as against all other creditors of the trustee (s. 915).

As to the management of a trust, it is provided that the cestui que trust shall not establish a trust by which the trustee shall be subject to the continuing advice of the cestui que trust. If this is foreseen, the trust shall be considered as a simple agency or similar agreement (s. 918). The trustee is entitled to compensation for his outlays, and to an adequate trust fee (*Treulohn*) unless the contrary appears from the instrument of trust (ss. 920, 921). The claim of the trustee lies in the first place against the cestui que trust, then against any beneficiary. In case of conflict the Court can decree the amount of compensation and fee in summary procedure. The trustee shall make and keep running an inventory of the trust fund. He is obliged to give a yearly account either to an auditor, if one is appointed by the instrument of trust, or otherwise, to the cestui que trust, or possibly to a beneficiary, and if none of these are in a position to accept it, to the Court. In special cases the Court can order an inspection of accounts (s. 923). The trustee is responsible for every breach of trust.

He must not obtain any advantage from his trust, except such as is provided in the trust deed or by law, such as compensation for disbursements, damages and trust fee. He must not do business with the trust fund on his own account, nor buy or otherwise take in assets of the same or transfer them to near relations or friends. If he has mixed moneys of the trust fund with his own moneys, he has to pay one and a half time the ordinary interest for the same, and if he has done business with such money, he shall bring it into account and pay over the whole profit of such transactions to the trust fund. If it is impossible to calculate the amount of such profit, the trustee may be caused to pay a certain amount of fixed

interest (*Vergütungszinsen*). The claims of the trust fund may be brought against the trustee through a judicial trustee appointed by the Court (s. 928). There are further provisions as to the beneficiary (s. 927), and the possibility of mobilizing the trust fund through trust certificates (s. 928). There is a general right of supervision over ordinary trusts, which are entered in the Register of Publicity, which supervision is to be exercised by the Court (*Landgericht*). The Court has a right of removing a trustee who neglects his duties (s. 929). Finally there are as usual the provisions on International Private Law. S. 930 provides that trusts, the funds of which are within the country, or the trustee or the majority of co-trustees of which are in the country, or when the trust deed provides for it, or in case of implied trusts, if the transaction which has created them has been made in the country, shall be considered as home trusts. Foreign trusts shall not have a better position within the country than home trusts. S. 931 provides that trusts can be put under foreign law by their deed or agreement of trust, under two reserves:

1. That in so far as the relations between the cestui que trust, the trustee and the beneficiary are regulated by foreign law, the provisions of that law shall be clearly expressed in the instrument of trust, and that as to the relations between the trust itself and third parties home law shall be applied.

2. That in case of differences between the cestui que trust, the trustee and the beneficiary arbitration shall be obligatory. The latter provision is evidently meant to exclude for the Liechtenstein Court the necessity of studying complicated foreign legal matter.

The P.G.R. system of trusteeship is aimed at making the establishment of home and foreign trusts possible within the country. A fifth part of the P.G.R. concerns the often cited Register of Publicity, the law of Firm Names, and Commercial Accounts. The last part is formed by Provisions of Introduction and by Transitory Law. In spite of the importance which these parts have in the actual system of Liechtenstein law, they are of a more local interest, and would exceed the purpose of this paper.

DIVORCE IN JEWISH LAW.[1]

[*Contributed by* Dr. Samuel Daiches, *Barrister-at-Law and Lecturer in Rabbinics at Jews' College, London.*]

The subject of divorce in Jewish law, its historical development and present-day practice, is a large one. I will endeavour to deal with it briefly, and, I hope, not inadequately, in the short space allotted to me.

The capital reference to divorce in the Pentateuch is in Deuteronomy xxiv. 1–4, which reads as follows in the English translation :

(1) When a man taketh a wife, and marrieth her, and it cometh to pass, if she find no favour in his eyes, because he hath found in her some unseemly thing, that he writeth her a bill of divorcement, and delivereth it into her hand, and sendeth her out of his house, (2) and she departeth out of his house, and goeth and becometh another man's wife, (3) and the latter husband hateth her and writeth her a bill of divorcement, and delivereth it into her hand, and sendeth her out of his house ; or if the latter husband, which took her to be his wife, die ; (4) (then) her former husband, which sent her away, may not take her again to be his wife, after she is defiled ; for that is abomination before the Lord : and thou shalt not cause the land to sin, which the Lord thy God giveth thee for an inheritance.

This translation is given by all modern commentators.[2] Verses 1–3 form the protasis, and v. 4 is the apodosis.[3] Divorce is not enacted in this Biblical passage, but presumed as existing. Dissolution of marriage by divorce was an established custom. Divorce was effected by the writing of a Bill of Divorcement and by the husband placing the writing into the hand of the wife. The main object of these verses is the prohibition of remarriage by the first husband of the wife whom he had divorced, after the divorced wife

[1] Paper read before the Society for Jewish Jurisprudence in the Temple, on March 15, 1926.

[2] See Driver, Commentary on Deuteronomy, in *International Critical Commentary*, 1902, pp. 269–71.

[3] On " some unseemly thing " (or " indecency ") Driver remarks : " It is most natural to understand it of immodest or indecent behaviour " (*op. cit.*, p. 271).

had married again and had been divorced by her second husband, or had been left a widow through the death of her second husband. This law no doubt tended to restrict divorce. If remarriage, after the divorced wife had married again, was prohibited, the husband would often think twice before he divorced his wife. The Hebrew words for "Bill of Divorcement" are *sefer k'rituth*, which mean literally, "a document of cutting off, of complete severance." Just as marriage is effected by the husband taking the woman as his wife, so divorce is effected by the husband giving a document of divorce unto his wife and sending her away and setting her free to marry again. The husband could not divorce his wife by mere word of mouth. A formal document had to be drawn up which the husband had formally to hand over to his wife. The words *sefer k'rituth* also occur in Isaiah l. 1 and Jeremiah iii. 8. The technical term for "divorcing" was "sending away," in Hebrew *shalaḥ*, as used in Deuteronomy in the same texts (see also Isaiah l. 1, and Jeremiah iii. 1, 8).

In the Code of Ḥammurabi (the Babylonian Code of Laws of about two thousand years B.C.) divorce is mentioned (paragraphs 137–43). But divorce in Ancient Babylonia was not required to be by writing and was apparently possible by word of mouth (paragraph 141). In the Jewish Aramaic papyri of Assuan [1] (5th century B.C.) the contingency of divorce is alluded to (in papyrus G.—the wife can *claim* divorce), but divorce is not actually recorded in these papyri.

In the Mishna (literally "learning"; the Jewish Code of Laws composed in Palestine during the first two centuries of the common era [2]) and generally in the Talmud [3] the deed of divorcement is called *Geṭ*. *Geṭ* is an Aramaic word which is also found in the Assyro-Babylonian language and frequently occurs in Babylonian

[1] See *Aramaic Papyri discovered at Assuan*, edited by A. H. Sayce, with the assistance of A. E. Cowley, London, 1906.

[2] The great Roman jurists Capito and Labeo, the Schools of the Sabinians and Proculians, Gaius, Papinian, Ulpian, Paul and Modestinus, flourished at the same period. Papinian and Ulpian came from Phœnicia, and Gaius probably also came from Asia (see Muirhead, *Historical Introduction to the Private Law of Rome* (1916), pp. 291 ff.).

[3] The Mishna and the Gemara—(literally "completion," "complete tradition": the literature dealing with the Mishna and embodying many early and later traditions and extending from the beginning of the third to the end of the fifth century) together are called the Talmud. There is a Palestinian compilation of the Talmud and a Babylonian compilation of the Talmud. The larger and more important compilation is that made in Babylonia. "Talmud" generally denotes the Babylonian Talmud.

contract-tablets. The Assyro-Babylonian form of the word is *Giṭṭu*. *Geṭ* (or *Giṭṭu*) means "a document," "a deed." Any legal document, or deed, is called *Geṭ*. *Geṭ ḥob* is a document of indebtedness. *Geṭ shiḥrur* is a document of emancipation (of a slave). A document of divorce is called *Geṭ k'rituth* (Talmud, *Sanhedrin* 11*a*, *Ketuboth* 9*a*), "a document of divorce," or *Geṭ ishsha* (Talmud, *Giṭṭin* 10*a*), "a document of a woman" (sc. of divorce), or *Geṭ piṭṭurin* (Talmud, *Giṭṭin* 85*a*), "a document of release." In most cases the word *k'rituth*, or *ishsha*, or *piṭṭurin*, is left out and only the word *Geṭ* is used. Thus, a Bill of Divorce came to be called simply *Geṭ* in Jewish law. The volume in the Talmud dealing with divorce in its various aspects and the legality of the documents of divorce, etc., is called *Giṭṭin* ("Documents," sc. of Divorce). The material part of the document is, according to one view, the formula (addressed by the husband to the wife): "thou art permitted for any man" (*i.e.* thou art free to marry any man thou mayest choose). According to another view, the following words must be used in the *Geṭ*: "And this (document) shall be to thee from me a document of sending away, a letter of freedom, and a deed of release (so that thou canst go and marry any man thou mayest choose)" (*Giṭṭin* 85*ab*). Great care had to be taken with regard to the writing and the attesting of the document of divorce. The formalities connected with the writing and handing over of the *Geṭ* necessitated the presence of a scholar versed in the law relating to divorce, a scribe, and two witnesses. One of the greatest judges of Talmudic times (Samuel, third century Common era) laid down the rule that he who is not well versed in the laws of Divorce and Marriage shall not have anything to do with them (*i.e.* shall not assist in the performance of marriage or in the giving of divorce). And this rule has prevailed among the Jewish people throughout the ages.

We have not got the full text of a *Geṭ* in the Talmud. But a comparison of the various formulæ preserved in the Talmud (see *Giṭṭin* 85*ab*) with the texts of *Giṭṭin* (Bills of Divorce) given in post-Talmudic collections of law,[1] which are almost identical with the form of the *Geṭ* used to-day, shows that the text of the *Geṭ* has practically always remained the same. It may be useful to give here the full text of the *Geṭ* in English translation:

[1] See, *e.g.*, the form of the *Geṭ* in *Halakhoth G'doloth*, a compendium of laws of the eighth century, or the *Geṭ* of Fostat (Cairo) of 1020 Common era, now in the Adler Library of the Jewish Theological Seminary of New York, reproduced in facsimile in L. Blau, *Die jüdische Ehescheidumg*, or the *Geṭ* of Fostat of 1088, reproduced in the *Jewish Encyclopædia*, vol. iv, p. 624.

On the — day of the week, the — day of the month, in the year — of the creation of the world, according to the number we reckon here, —— the city which is situated on the river——, I, —— son of ——, who stand this day in —— the city situated on the river ——, do hereby consent with my own will, without force, free and unrestrained, to grant a Bill of Divorce to thee, my wife ——, daughter of ——, who hast been my wife from time past, and with this I free, release and divorce thee, that thou mayest have control and power over thyself from now and hereafter, to be married to any man whom thou mayest choose, and no man shall hinder thee from this day for ever more, and thus thou art free for any man. And this shall be unto thee from me a Bill of Divorce, a letter of freedom, and a deed of release according to the Law of Moses and of Israel.

——, son of ——, witness.
——, son of ——, witness.

" According to the law of Moses and of Israel " is an old formula. It is found in the earliest parts of the Talmudic literature (*Tosefta, Ketuboth* iv. 9). This formula was used both in the marriage ceremony and in the Bill of Divorce. Its meaning is clear : according to the written law of the Torah and the Common Law of Israel, in other words, according to established Jewish Law. (Cf. Deuteronomy iv. 44 : " And this is the law which Moses set before the children of Israel.")

The Jewish Law of Divorce has been practically the same from the time of the Talmud till the present day. The three important Rabbinic codes, Maimonides' *Mishne Torah* (twelfth century), the *Tur Eben Hæzer* (fourteenth century), and the *Shulḥan Arukh Eben Hæzer* (sixteenth century) [1] contain many chapters in which the laws and regulations with regard to divorce are set forth. On the whole they are identical with the laws and regulations laid down in the Talmud. They are only more fully elaborated and deal in greater detail with certain minutiæ, as the writing, spelling of the names, attesting by the witness, handing over of the *Geṭ*, etc. The first paragraph in the first chapter of the Laws of Divorce in Maimonides' *Mishne Torah* may be given here in translation :

The wife can be divorced only by a written document which must reach her, and this document is called *Geṭ*. And ten things are the essentials of Divorce according to the Torah (Biblical law), and they are these : (1) The husband shall divorce only of his own free will ; (2) And that he shall divorce by means of a written document and by nothing

[1] See my essays, *Jewish Codes and Codifiers*, London 1910, and *The Study of the Talmud in Spain*, London, 1921.

else ; (3) And that the purport of the document shall be that he divorce her and remove her from his authority ; (4) And that its object shall be the severance between him and her ; (5) And that it shall be (specially) written for her ; (6) And that after its writing nothing shall be missing but its delivery to her ; (7) And that he shall deliver it unto her ; (8) And that he shall deliver it to her in the presence of witnesses ; (9) And that he shall deliver it unto her for the purpose of divorce ; (10) And that it shall be the husband, or his messenger,[1] who shall deliver it unto her. And all the other matters in the *Geṭ*, as the date and the signature of the witnesses and similar matters, were all instituted by the scribes (Rabbis).

In the *Shulḥan Arukh Eben Hæzer* (the last authoritative Jewish Code, compiled by Caro in the sixteenth century), thirty-five chapters are devoted to the Laws of Divorce (cxix.–cliv.). At the beginning of chap. cliv.[2] the following injunction is given : " In the times of the Sages of the Talmud they used to appoint an expert scholar to deal with Divorces, and so it is also found in the words of the ancient scholars that they used to give a *Geṭ* only in the presence of the great men of the generation, and therefore only a great scholar shall deal with the giving of Divorce, and he who is not well versed in the Laws relating to divorce and marriage shall have no dealing with them."

Great care has to be taken with the writing and handing over of the *Geṭ* to the wife. Some authorities hold the view that in addition to the expert scholar (the learned rabbi), the scribe and the two witnesses, there should be present at the giving of the *Geṭ* six prominent members of the community, so that ten persons witness the giving of the *Geṭ*. The presence of ten persons is, however, not imperative. By the statements made by the scribe and the witnesses and by the questions which the rabbi addresses to the scribe, the witnesses and the husband, concerning the writing and the delivering of the *Geṭ* and concerning the intention of the husband, it is made clear and certain that the intention is that a divorce of husband and wife be effected by the handing over of this document by the husband to the wife (chap. cliv, paras. 55–74). The following paras. (81–7), as to their essential parts, may be given here in translation :

[1] The *Geṭ* may also be sent through a properly accredited messenger. All the laws and regulations relating to the giving of a *Geṭ* (consent of the wife, the writing, attesting, handing over, etc.) also apply in the case of the *Geṭ* being sent by a messenger. (See *Shulḥan Arukh Eben Hæzer*, cxl. 2.)

[2] The particulars of giving a divorce, of writing and handing over the *Geṭ* to the wife, of the validity of the *Geṭ*, are given in this chapter.

The wife shall place her hands together (palms upwards) in order to receive the *Get* (Bill of Divorce). He (the Rabbi) shall ask her whether she receives the *Get* of her free will, and she shall answer "yes." The Rabbi shall say to her: "Know that with this *Get* thou shalt be divorced from thy husband." The husband shall give the *Get* into her hand and shall say to her, while placing it into her hand: "This is thy *Get*, and take thy *Get*, and thou art divorced from me by it from now, and thou art free for any man." And before he (the husband) gives it unto her, the Rabbi shall say to the witnesses present that they should observe the handing over of the *Get*, and he (the Rabbi) shall first tell the husband the meaning of the words which he is saying. After he (the husband) has placed the *Get* into her hands and has removed his hand, she shall close her hands and hold the *Get* and lift up both her hands. After that the Rabbi shall take the *Get* from her hands and read it again in the presence of the witnesses, and he shall pronounce the ban of excommunication on anyone who would spread the rumour that this *Get* was not valid, and he shall make a tear in the *Get* (so as to avoid the possibility of that Bill of Divorce being used fraudulently for other persons), and the Rabbi shall tell the woman that she can become betrothed (marry again) only after the lapse of ninety days.

These paragraphs show clearly that if the giving of a *Get* is carried out properly so as to have its full legal effect, it is impossible that a wife should not know that the effect of receiving the *Get* was full and complete divorce, setting both husband and wife free to marry again. The last paragraph of this chapter (para. 101) repeats the injunction given at the beginning of the chapter, and reads, in translation, as follows:

> One should take great care that no one shall have anything to do with the granting of divorces except one who is well versed in the Laws of Divorce, because there are many important regulations and points to consider and it is easy for one to make a mistake and grave results would ensue, and may the Rock of Israel save us from errors.

Although technically marriage is effected by the husband taking the woman as his wife, marriage is in Jewish law a sacred covenant between husband and wife. In Malachi ii. 14, "the wife of thy youth" is called "thy companion and the wife of thy covenant." And in the first part of that verse the prophet says: "Because the Lord had been witness between thee and the wife of thy youth" (at the time of the marriage). And in Proverbs ii. 17, the strange (immoral) woman is referred to as one that "forsaketh the husband of her youth and forgetteth the covenant of her God." From the time of the Mishna till the present day marriage is called *Kiddushin*, "sanctification." The volume

in the Talmud dealing with the laws of marriage is called *Ḳiddushin*. The formula by which the husband betroths the woman unto himself as his wife is, *Harey ath m'kudeshet lee b'ṭabaath zu k'dath Moshe w'Israel*, "Thou art sanctified unto me by this ring according to the law of Moses and of Israel." Some of the loftiest and most beautiful benedictions of the Jewish Liturgy are the six benedictions recited on the occasion of a marriage. These benedictions are found in their present form in the Talmud (*Ketuboth*, p. 7). As they had then already a fixed form, they are at least two thousand years old. A marriage was intended to be for life. It was forbidden to marry a wife with the intention of divorcing her (Talmud, *Yebamoth* 37*b*; *Shulḥan Arukh Eben Hæzer*, chap. cxix, para. 1). Divorce was looked upon with disfavour. The prophet Malachi says (ii. 16): "For I hate sending away (divorcing), saith the Lord, the God of Israel." One of the great Rabbis of the Talmud says: "He who divorces his first wife, the altar sheds tears for him" (alluding to Malachi ii. 13). In another volume of the Talmud (*Pesachim* 87*b*) the Rabbis made the Prophet Hosea say to God: "Lord of the Universe, I have children from her (his erring wife), and I cannot send her away or divorce her." But it was realized that there must be the possibility of divorce. It was realized that occasions might arise when the man and the woman might be happier if their married life came to an end. It was realized that what the Law was asked to do was to give sanction to a state of mind and heart, which had been existing for some time between husband and wife, before they came to invoke the help of the Law. The bar to divorce is not in the law, but in the human heart. For a man to sever the bond of marriage, to send away his "companion and wife of the covenant" and the mother of his children, or for a woman to leave the husband of her youth and to break up the home, is not a normal human desire. It is only when united life is found to be impossible that the thought of divorce arises. And when that thought hardens into an unbendable determination, divorce can take place, according to Jewish law, without either party being compelled to sin. The great point in Jewish law is that adultery is not a preliminary condition for obtaining divorce. When the husband and wife have come to the unalterable conclusion that their continued united life is absolutely impossible, a divorce can bring relief. We have seen that Deuteronomy xxiv. 1–4, tended to restrict divorce. In Deuteronomy xxii. 19, 29, cases

are mentioned where divorce is entirely prohibited (unjust accusation by the husband of prenuptial unchastity of the wife and seduction by the husband of the wife before marriage). Restrictions of divorce are also mentioned in *Giṭṭin* 90*a*. And it is to-day the duty of every Rabbi, who is called upon to preside at the giving of a divorce, to endeavour to persuade the husband and the wife to continue their married life. The necessity of paying, before giving the divorce, the sum agreed to be paid in the marriage contract (*Ketubah*), also often prevented divorce. But when it is evident that the continuation of married life is impossible, divorce is obtainable according to law.

Divorce against the will of the wife seems to have been very rare even in olden times. The very fact that the *Geṭ* had to be put into the hands of the wife made compulsory divorce difficult. But since the time of Rabbi Gershom (eleventh century), divorcing a wife against her will has been absolutely prohibited (*Shulḥan Arukh Eben Hæzer*, cxix. 6). A great Rabbinic authority of the thirteenth and fourteenth centuries, R. Asher (called "Rosh"), refers to the decision of R. Gershom in the following words: "And, in order to make the right of the wife equal to that of the husband, he (R. Gershom) decreed that just as the husband cannot send away (divorce) his wife except of his free will, so cannot the wife be sent away (divorced) by the husband except of her free will" (*Responsa* of R. Asher, xlii. 1). For divorce in Jewish Law, as it stands now, what is required is mutual consent. It is the husband who technically gives the divorce. But husband and wife must both agree to dissolve the marriage covenant.

Marriage is sacred. Divorce is profane. Marriage is sanctified by love. Divorce is made profane by the absence, by the banishment of love. Marriage is celebrated. Divorce is merely given. Marriage is blessed with beautiful words of divine praise. Divorce is effected by a ceremony which is grim and austere. But there is one element which is entirely ruled out in divorce in Jewish law: the necessity of adultery. Jewish law looks upon adultery as a very grave sin (see Leviticus xx. 10; Deuteronomy xxii. 22). Jewish Divorce Law forbids marriage between the adulterous respondent and co-respondent after divorce has been obtained. If they marry, their marriage must be dissolved (*Eben Hæzer* xi.). In fact, Jewish Divorce Law is framed largely to prevent adultery. Generally, mutual consent (which, as pointed out, is not so easily arrived at) is the basis of divorce in Jewish law. Contrarily, a

divorce by the Court to-day is practically always against the will of one of the parties. The petitioner, as a rule, gets a decree against the will of the respondent.

There are, however, specific grounds in Jewish law which entitle the husband to compel the wife to accept a divorce and entitle the wife to compel the husband to give a divorce. The grounds are: (*a*) On the part of the wife: (1) adultery, or strong suspicion of adultery; (2) public indecency; (3) change of religion, or disregard of the Jewish laws in the conduct of the house; (4) refusal of co-habitation for a year; (5) refusal to follow the husband to another domicile; (6) grossly insulting behaviour; (7) an incurable disease which renders marital relations impossible.[1, 2] (*b*) On the part of the husband: (1) Impotence; (2) a loathsome chronic disease; (3) being engaged in a malodorous business; (4) ill-treatment of his wife; (5) change of religion; (6) dissoluteness of morals; (7) refusal of co-habitation; (8) refusal to support his wife.[3] If the husband refuses to give a divorce, the Beth Din (the Rabbis) may compel him to do so. The Ecclesiastical Authorities are allowed to adopt any measure they think right in order to enforce the giving of the *Get*. They may refuse to perform for the husband necessary ritual ceremonies, and they may, under certain circumstances, submit him to corporal punishment and excommunicate him (see Talmud, *Ketuboth 77a*, and *Eben Hæzer* cliv, 21, and *Responsa* of R. Asher, xliii, 4).

The husband cannot divorce his wife when she is insane (see Talmud, *Yebamoth* xiv, 1, and *Eben Hæzer* cxix, 6). If the wife is incurably insane, one hundred rabbis only can give the husband the permission to marry a second wife by way of exception to the law against bigamous marriage (see *Jewish Encyclopædia*, vol. xi, pp. 673-4). But the first wife must not be divorced.

This is the Jewish Law of Divorce, briefly sketched.

[1] The marriage settlement (*Ketubah*) is forfeited by the wife if the divorce takes place through the fault of the wife.

[2] In the *Code of Ḥammurabi*, grounds for divorcing the wife are given in para. 141. The following is the English translation of para. 141: "If the wife of a man who is living in the house of her husband has set her face to go out and has acted the fool, has wasted her house, has belittled her husband, one shall put her to account, and if her husband has said, 'I put her away,' he shall put her away and she shall go her way, he shall not give her anything for her divorce. If her husband has not said, 'I put her away,' her husband shall marry another woman, that woman as a maid-servant shall dwell in the house of her husband (C. H. W. Johns, *The Oldest Code of Laws in the World*, Edinburgh, 1903).

[3] See M. Mielziner, *The Jewish Law of Marriage and Divorce*, pp. 122–4.

There remain a few words to be said with regard to the relation of the Jewish Divorce Law to the English Divorce Law. It will have been seen that the fundamental difference is the requirement in the latter system of adultery for divorce. In Jewish Divorce Law no adultery is required. In English law adultery is *conditio sine qua non*. This requirement of adultery forms the gulf between the two systems of Law of Divorce. In English Common Law there is no divorce. Marriage cannot be dissolved during the life of the husband and wife. Before 1857 divorce could be obtained only by an Act of Parliament. Since 1857 divorce can be obtained by a decree of the Court. Recently an Act of Parliament was passed making the adultery alone of the husband, without any other matrimonial offence, a ground for divorce. Very few wives take advantage of the new Act of Parliament authorizing divorce on the ground of the adultery alone of the husband. This shows that to make divorce easier does not mean making it more frequent. Divorce is against better human nature. The purity of Jewish home life has certainly not suffered through the Jewish Law of Divorce by consent of the parties. Statistics show that divorce is less frequent among Jews than in other communities (see *Jewish Encyclopædia*, vol. viii, p. 340).

The Jews of this country (as in all other countries) must obtain divorces through the Jewish Ecclesiastical Authorities before they can effect fresh religious marriages. And the Beth Din of London granted divorces (*i.e.* allowed divorces to be given) for all purposes up to 1866. In 1866 the Registrar-General decided that he could not recognize as valid in English Law a divorce granted by the Jewish Ecclesiastical Authorities of London. Consequent upon this decision by the Registrar-General the London Beth Din discontinued granting divorces except after a decree by the Court (see *Minutes of Evidence taken before the Royal Commission on Divorce and Matrimonial Causes*, vol. iii, (1912) p. 407).

There are to-day schools of thought in England that regard it as desirable that the English Divorce Law be modified so that adultery be no more the preliminary condition of divorce.[1] If and when such a change of the English Law of Divorce will be effected, there may be the possibility of the English Courts recognizing also a Jewish divorce.

[1] In Scotland, Holland and Germany divorce is granted for desertion, in France for ill-treatment, and in the United States for desertion or cruelty.

THE NEW CHINESE CODES.

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CHINA is essentially a country of law, and yet her legal system has proved one of the greatest obstacles to the promotion of free and friendly intercourse between China and the West. In the early days at Canton, conflicts between citizens of Western powers and the Chinese officials over the jurisdiction issue were incessant. From 1845 to 1900 most of the European Powers, the United States and one or two other American states, and Japan secured extraterritorial privileges in China, in virtue of treaties concluded with the Chinese Government. At first, the surrender of these rights does not seem to have been regarded as a serious derogation from sovereignty by the Chinese Government. Increasing contact with the West, however, caused her Ministers at the end of the nineteenth century to regard the powers already conceded with increasing apprehension, at the same time endeavouring to limit the extent of the concessions. As a result, only Switzerland (1915) has obtained a grant of extraterritoriality since 1899, whilst Germany, Austria-Hungary and Russia have lost their rights, and several Powers entering into relations with China recently have been denied similar privileges to those enjoyed by the Treaty Powers. The abolition of all extraterritorial rights in Japan filled the Chinese with a desire to procure a similar abolition in China. Since the War that desire has been intensified, and at present the more extreme political parties in China manifest a strong inclination to concentrate upon a continuous denunciation of the " unequal treaties."

The Reform Movement.—The first legal system in China is said to date from the time of Huang Ti (2689 B.C.), whilst Parker observes that the two great periods of legal activity in China are the Han dynasty 200 B.C.–A.D. 200), and the T'ang dynasty (A.D. 600–A.D. 900).[1] Her earliest legal activity, therefore, if the records are correct, coincides roughly with the reform movement of Urukagina in Babylon, whilst the two great periods of Chinese jurisprudence coincide in date with the maturity of Roman law, and the period of its decline, under the successors of Justinian in the East, and the assimilation of Roman law into the barbarian Codes in the West. It is not surprising, therefore, that when intercourse between the West and China extended in the nineteenth century, Chinese law, though fully conscious of its great

[1] *China*, 2nd edition, 1917, p. 340.

tradition, should not be able to satisfy the demands of a modern society, nor that the Codes of the successive Emperors (excellent as many competent observers, including Sir George Staunton, have declared them to be) should no longer be efficiently enforced within the Empire. Legal systems flourish and decay, in the same manner that empires do, and it is merely one of the misfortunes of history that the period of intercourse with the West should also be for China the period of legal stagnation.

Moreover, Chinese law, free as it had certainly been for many centuries from Western influence, was cast in a form exceedingly strange to the Western critic. Family law, as in the early days of European law, was not a fit topic for legislation at all. It depended upon custom, and was administered by the heads of families. Commercial law existed, but that again depended upon the customs of the merchants, and was enforced by the guilds (somewhat in the same way as mercantile law was enforced in Europe before it was incorporated into municipal law). The law of the emperors was therefore wholly penal in form—a circumstance upon which the Westerner in China often reflected unhappily. *The Chinese Repository*—a monthly periodical published in Canton between 1831 and 1851—constantly cites examples of the results of this view of law in practice, with the inference (which is sometimes implied, but more frequently stated in the text) that such a system of law framed in this fashion ought not to be extended to the Westerner. The solution of the difficulty was the imposition of extraterritoriality.

The legal reform movement in China may be said to have been inaugurated by an Imperial decree of July 29, 1898, foreshadowing a number of reforms of the Courts. The date is significant. Japan had recently completed her arrangements with the Western Powers for a relinquishment of extraterritorial jurisdiction. China wished to do the same, but her statesmen realized that drastic reforms must come first.

The first reform movement in China, however, was initiated by the Emperor, Kuang Hsu, and a small group of enthusiasts, practically unaided. It was brought to a sudden end (after only a hundred days of reform) when the Emperor tried to imprison his aunt, the Empress Dowager. Learning of the plot, she acted with energy, and succeeded in imprisoning the Emperor himself. After that, a period of reaction, culminating in the Boxer Rebellion, began. As soon as the Boxer Rebellion was ended, however, the task of legal reform was resumed. Viceroys Yuan Shih-kai and Chang Chihtung were commanded to supervise the translation and adaptation of foreign laws, and in 1905 a commission for the Revision of the Statutes, comprising Dr. Wu T'ing-fang, a member of the English Bar, and a former Minister to the United States, and Shen Kia-peu, an eminent Chinese lawyer, was appointed. With this commission Japanese experts were associated, and civil, commercial and criminal codes were prepared, all of them being considerably influenced by the Japanese Code. These Codes, however, met with con-

siderable opposition. They introduced a number of important reforms. The old law declared that no person accused of crime could be punished until he had confessed. As a natural result, corporal punishment and torture were freely used to extort confessions. Both were now abolished, and modern methods of trial instituted. Moreover, the cangue,[1] as a method of punishment, was replaced by a fine. At the same time, however, the fusion between the native and the foreign elements in these Codes was not by any means complete, and Parker indicates that they failed to recognize the ethical principle of Chinese law, based on family rights, duties and responsibilities.

These draft Codes were never officially promulgated, although the Criminal Code was adopted by the Republican Government as applying to every case, after the revolution in 1911. Since that date the process of codification has continued unceasingly. A revision of the Criminal Code was approved in 1914, and a second revision was undertaken shortly afterwards. The Commission was reorganized and extended, and Dr. C. H. Wang was appointed Chairman in 1916. In 1918 Mr. Tung K'ang, Mr. Lo Wen-Kan and M. George Padoux, formerly legal adviser to the Siamese Government, were added. The Washington Conference, and the resolutions there adopted, gave added impetus to the Commission's activities, so that the following volumes have now been published: *The Provisional Criminal Code* (Peking 1923); *The Regulations Relating to Criminal Procedure* (Peking 1923); *The Ordinance for the General Regulation of Traders* (Peking 1923); *The Trade Mark Law* (Promulgated May 3, 1923); *The Regulations Relating to Civil Procedure* (Peking 1923); *The Chinese Supreme Court Decisions* (Peking, 1923); *Laws, Ordinances, Regulations and Rules Relating to the Judicial Administration* (Peking 1923); *The Constitution and Supplementary Laws and Documents* (Peking 1924); *Chinese Prisons* (Peking 1925).[2]

Several other problems faced the pioneers of legal reform in China. In the Imperial system of government there was no distinction be-

[1] The object of the cangue was originally to humiliate, rather than physically to punish the prisoner. It consisted of a large wooden frame, fastened on the prisoner's neck, and worn day and night. It was thus impossible for the prisoner to lie down or to feed himself. It might thus be used (and, indeed, it frequently was used) as a means of torture. Writing in 1881, Mr. Allen, Acting Consul at Shanghai, commented on its use by native tribunals as follows: "The wooden framework of the collar often weighs as much as 75 lb. It is kept on night and day, almost preventing the possibility of sleep, and the convict is exposed to the rays of the sun and the pelting rain. (Kotenev, *Shanghai: Its Mixed Court and Council*, p. 92.) In the Mixed Court, a modified form, weighing from 4 lb. to 8 lb., was used, the original character of the punishment (which was something in common with the pillory) being thus retained.

[2] This comprises the full list of publications so far translated into English under the direction of the Chinese Commission on Extraterritoriality. Other Codes are mentioned in *The Present Conditions of the Chinese Judiciary and Its Future*, by the Chairman of the Commission on Extraterritoriality, His Excellency Chang Yao-tseng. *The Chinese Social and Political Science Review*, vol. x, No. 1 (January 1926), p. 163.

tween the administrative and the judicial function. Since the revolution this separation has been effected, and the whole of the Judiciary reorganized, and the independence of the judges has been theoretically secured. Again, the condition of Chinese prisons has not been neglected. A special prison department was created in 1906, and the first model prison was completed in 1912. At the present time there are seventy-three modern prisons in China.[1]

The Constitution.—The constitutional reform movement, like the legal reform movement, began during Kuang Hsu's "Hundred Days of Reform," and between 1901 and 1905 a number of reforms were effected. In 1905 a Commission was sent to Europe and the United States to study constitutional methods. When it returned in the following year, the work of political reorganization continued more quickly, and in 1907 an Imperial Edict authorized the establishment of a National Consultative Council and of Provincial Assemblies. A year later, a Nine Years' Programme of Constitutional Preparation was published in another edict. The deaths of the Emperor and of the Empress Dowager in November 1909 gave rise to the fear that the process of reform would be interrupted. The issue of reforming edicts continued, nevertheless, and the Consultative Council at last met on October 3, 1910. One of the first acts of this Council was to reduce the Nine Years' Programme to six years, and it also advocated, and succeeded in obtaining, the creation of an Imperial Cabinet. In spite of what had been accomplished, however, and the imminence of further reforms, the Revolution, when it broke out in 1911, rapidly spread, and after sweeping away the monarchy, the nation started to build the constitution afresh. With occasional interruptions it has been doing that ever since. A National Convention assembled at Nanking, though in its early stages it was national in name only, being controlled by the military leaders of the various provinces.

It is impossible here to trace the process of constitution making in China in detail. The Convention was transferred, with additions to its numbers, to Peking, and became a National Assembly, issuing various constitutional documents, and in December 1912 and January 1913 the first Chinese Parliament was elected. It immediately appointed a Commission to prepare a permanent constitution, and a draft constitution was submitted to Parliament in November 1913. During the same year a rebellion broke out in the lower Yangtze valley, and President Yuan Shih-kai, suspecting that a number of Kuomintang delegates were indirectly involved in it, dissolved the Kuomintang, thus reducing the

[1] According to the tables on pp. 6–11 of the volume *Chinese Prisons*. It is stated a little earlier, however: "The most complete prisons already established are the First, Second and Third Prisons of Peking, the First Prisons of Chinli, Fenghen, Kirin, Shantung, Shansi, Kiangsu, Anhwei, Kiangsi, Chekiang and Hupeh, altogether more than ten. In addition to these there are more than forty other new prisons, though less complete. Additional ones are to be established from year to year" (p. 5).

Parliament to a "Rump." On January 11, 1914, the President took the further step of dissolving Parliament altogether. It was reconvened by President Li Yuan-Lung in 1916, dismissed by him in 1917, and reassembled once more in 1922. Meanwhile, a second Parliament, elected by a different process under Election Laws introduced by the Special Administrative Council of President Feng Kuo-chang, claimed to be the true representatives of the Chinese nation, although without success. A fresh document, declared to be the Permanent Constitution of China, was adopted by the original Parliament on October 10, 1923.[1] Since this is the document which the Chinese Commission of Extraterritoriality published in the series of Codes already mentioned for the perusal of the Extraterritoriality Commission, it will be instructive to examine its principal features.

The form of government is to be for ever republican, and sovereignty is considered to be vested in the people as a whole. The fundamental rights of Chinese citizens, including equality before the law, freedom from arrest and imprisonment except in accordance with law, immunity of citizens' houses from unlawful entry and search, secrecy of correspondence, freedom of residence, occupation and religion, and freedom of association, of speech and of publication, and the adequate protection of proprietary rights—are guaranteed by Chapter IV of the Constitution. All citizens, moreover, possess the franchise and the right to be elected, together with the duty to receive elementary education. The following chapter specifies the powers of the National Government together with those appropriate to the Provincial governments or their subordinate districts. Art. 26 deals with unspecified powers, and provides for a usage different both from that prevailing in the United States (where unspecified powers belong to the State Governments), and from that of Canada (where such powers belong to the Central Government). The Chinese Constitution declares: "Where any matter not specified in Arts. 23, 24 and 25 arises, it shall be a matter of the Republic if by its nature it concern the Republic, and of a Province if by its nature it

[1] The constitutional history of China since 1911, and the various constitutional documents, are set forth in *The China Year Book*, 1925, pp. 615–705. In the *Chinese Social and Political Science Review*, vol. x, No. 1 (January 1926), Professor Lone Liang publishes the first of a series of articles dealing with "China's New Constitution." In this he points out that the 1923 Constitution has been considered invalid for various reasons, and he sketches the scope of a new constitution, which is now being drafted, following the adoption of Rules of Procedure for its preparation on May 3, 1925. Of the new constitution, he observes: "While the new draft may not appear to differ very much from the previous documents in reality and substance, the new one not only contains material improvements over the old, but it has also introduced a fundamental change in the form of state, to the amazement of many political observers. In fact it is no longer a constitution of a unitary state, but a constitution of a federation in character, if not in name" (p. 162). This newest draft was completed on October 23, 1925, and comprises 168 Articles. There is at present no indication that it represents the end of China's constitution-making activities.

concern a Province. Any controversy arising in this connexion shall be decided by the highest Court of Justice." To the Supreme Court also the power of interpreting and invalidating National and Provincial laws *ultra vires* is conceded, but controversies between Provinces are to be decided by the Senate. Compulsory military service is imposed by Art. 32, and in peace time the military expenditure must not exceed one quarter of the total National expenditure—a liberal allowance. Provinces are not allowed to conclude political alliances or retain standing armies.

Parliament comprises a Senate elected by the highest local assemblies and other legally constituted electoral bodies, and a House of Representatives, elected by districts on a population basis. No member of either house may hold civil or military office. Senators are elected for six years, one-third retiring every two years, Representatives for three years. Half the members of either house must be present before deliberations can begin. The House of Representatives may impeach a President or a Minister before the Senate, but his punishment is decided by the Supreme Court.

"The executive power of the Republic of China shall be exercised by the President with the assistance of the Cabinet Ministers." The President is elected by an Electoral College, composed of all the members of Parliament. The Vice-President is elected at the same time, and succeeds to the Presidency if the office becomes vacant before the expiring of the normal period of five years. The President appoints and dismisses civil and military officials, he is commander-in-chief of the army, foreign ambassadors are accredited to him, he declares war and concludes treaties. Generally speaking, his position corresponds with that of the President of the United States. At the same time, his freedom of action is limited by a Cabinet, which is appointed with the approval of the House of Representatives, and which is responsible to it. Obviously, the position of such a Cabinet in the frame of government depends largely on the personalities of the President and the Premier, coupled with the extent to which popular approbation or disapproval can be made effective through Parliamentary institutions. A defect of the constitution is that while the powers of the Supreme Court with regard to the validity of laws are clearly implied in earlier parts of the document, the chapter on the Judiciary fails to deal with the constitution and powers of the Supreme Court beyond specifying that its President shall be appointed with the approval of the Senate. As far as legislation is concerned, the President may ask Parliament to reconsider a Bill, but if they present it to him again, he must accept it. Financial measures must originate in the House of Representatives. Local government receives a separate chapter. Each Province has a unicameral representative Assembly, and a Provincial Assembly Council. Below the Provincial Assembly is the District Assembly. The District has also a District Council and a Magistrate. Both the Province and the District

are taxing bodies. The procedure by which the Constitution is amended is a little complicated. Not less than one-fourth of the members of either House may present a motion. If it is adopted by a two-thirds majority of the members of each House, a Constitution conference, composed of the members of both Houses, shall be called. It may not deliberate unless two-thirds of the total members are present and its decisions must be accepted by three-fourths of those present. The republican form of government may not be changed at all.

Surveying the Constitution as a whole, the impression gained is that the framers of this Constitution started by taking that of the United States as a model, and then found it necessary to work out the idea differently to suit the special conditions prevailing in China.

Enforcement of Chinese Law.—The Constitution just described is unfortunately a paper constitution only. It represents the aspirations of a small group of earnest Chinese statesmen. The authority of the Chinese Government, however, does not extend very many miles beyond Peking, unless the Government is supported by some powerful militarist, in which case it is effective in the area under his control for precisely so long as he finds it convenient to enforce it. Under any circumstances the South is entirely separate from the North, and is working out a constitution of its own under more extreme influences. Certainly provisions such as those guaranteeing the liberty of the subject, the freedom of the press, and compulsory education are utterly at variance with existing conditions, and it may be, indeed, that China will have to suffer a period of military dominance from some single general before a modern constitution is effectively established. Even then, it is doubtful whether it will embrace Kwangtung. Similarly, the whole system of Chinese law, as at present constituted, is satisfactory in theory, but inefficient, arbitrary and corrupt in practice. Here and there it is possible to find a public spirited civil or military governor who will secure the administration of justice, but generally, even in the immediate vicinity of the treaty-ports, evils flourish unchecked, and are constantly reported in the European press in China. Moreover, since the revolution, an obnoxious type of official has become prominent—one who owes his office to the favour of some military leader, and who is often, therefore, both illiterate and corrupt. It may be an interesting speculation whether it is better to be oppressed by an unscrupulous literatus, such as the Imperial officials were, or an ignorant ex-bandit, such as the present subordinate officials sometimes are—but these questions are too often practical problems in China. Again, although the model prisons in China may compare very favourably with prisons in Europe and America, the older type—the unsanitary and unclean dungeon—still abounds, and even the private jail is not unknown. Had Chinese Western-trained statesmen been allowed a free hand, it is probable that these things would now have been finally abolished; but a Statesman who is regarded with

the very highest respect in the West may be rendered powerless by a selfish and disruptive military cabal.[1]

Organization of the Courts.—There are three grades of Courts in China—District Courts, High Courts and the Court of Cassation. Formerly there were local Courts also, but these were abolished in 1915, and their functions transferred to the District Courts. The jurisdiction of the Courts is civil and criminal, but it does not normally extend to military or administrative cases.

The District Courts are organized as Courts of First Instance and as Courts of First Appeal. The High Courts hear appeals from the District Courts sitting either as Courts of First Instance or as Courts of First Appeal. The Court of Cassation has both an original and an appellate jurisdiction. As a Court of Final Appeal, it hears appeals from the High Courts. Its original jurisdiction is exercised in virtue of special laws, authorizing it to do so. To the Courts of each grade, a corresponding procuratorate is attached, comprising a Chief Procurator and two or more procurators. The functions of a procurator are: (1) In criminal cases: To make searches, institute prosecutions, conduct prosecutions and supervise the execution of judgments as provided by the Code of Criminal Procedure and other laws or ordinances. (2) In civil cases and other matters: To act as a party to a case or as a representative of some public concern, as provided in the Code of Civil Procedure and other laws.

Judges and procurators are appointed from the ranks of those who have been successful in the appropriate examinations. After the first examination (which is open only to those who have studied law in a law school for at least three years, and have obtained certificates of graduation) the successful candidates become probationers, under the supervision of the president or the chief procurator of their respective Courts. At the end of two years of probation they sit for a second examination, and, if successful, they become expectant judges or expectant procurators. From these, vacancies in the ranks of the judges and the procurators are filled up. No judge or procurator may take any part in politics, be a member of a national local assembly, edit a newspaper, practice as a lawyer, hold any office other than those permitted by law, or engage in trade or in any occupation inconsistent with the holding of a public office. When a judicial official contravenes or neglects his functions or loses his official dignity or credit, he may be subjected to disciplinary punishment on the decision of a special tribunal. Such punishment may be: (1) Deprivation of rank; (2) Dismissal; (3) Degradation in rank; (4) Suspension of functions; (5) Change of office; (6) Reduction of salary; (7) Reprimand by presidential mandate, published in the Government Gazette.

Prisons.—The construction of new prisons in China has already been

[1] The Chinese Constitution has now been suspended owing to the occupation of Peking.

mentioned. The publication of the Chinese Commission on Extraterritoriality dealing with prisons [1] briefly sketches the history of prison reform in China, and then observes :

In view of the fact that the reform of prison administration depends largely upon the securing of men of ability and knowledge, and that such kind of men can be produced only by education and training, some Provinces began in the early days of the Republic to establish schools for the study of prisons. Later, the Ministry of Justice published the regulations governing the schools for the Study of Prisons, prescribing the following as necessary courses : Elementary Jurisprudence, Constitutional Law, Criminal Law, Law for the Organization of the Judiciary, Study of Prisons, Rules of Prisons, Prison Administration, Policies of Criminal Administration, Reformatory Schools, Protection of Persons Discharged from Prisons, Method of Identification by Finger Print, Police System, Social Psychology, Hygiene, Statistics, and Prison Construction. Blank forms have been issued to the chief procurators of the different High Procuratorates for reports on the inspections which it is their duty to make. Graduates from such schools are sent to new prisons for practice. In the tenth year of the Republic (1921) the Regulations governing the Research Institutions of Prison Administration and the Institutions for Making Up the Study of Prison Administration were published. In accordance with their provisions, officers of both the old and new prisons are to be summoned in turn to such institutions for discussion and training so as to pave the way for progress.[2]

Like many other things connected with Chinese law and politics, this paragraph is a record of aspiration, rather than of achievement. The wardens of the majority of Chinese prisons to-day are creatures of the militarists, and have certainly not, as a rule, received the training provided for here. Within a limited area, however, in the vicinity of the capital, modern theories are applied to the prison organization. There is at present no indication at all that any improvements on the vile conditions prevalent during the Empire are being attempted in the South.

Criminal Law and Procedure.—The provisional Criminal Code of China is interesting because it was the first portion of the work of codification to be completed, and, moreover, because it is the only part of the new legislation which has been generally enforced during the Republic.[3] Perhaps it is for this reason that several revisions of it have already been found necessary ; and it is therefore probable that the final form has not yet been achieved. The first article of Chapter II declares : " No act constitutes an offence, unless the same is specifically made so by law " —an obvious enough principle in Western systems of law, but one unknown to the older Chinese law, and not invariably respected at the present time. Although no person under twelve is considered capable

[1] *Chinese Prisons*, Peking 1925.

[2] *Ibid.*, pp. 3–4.

[3] A comparison by the draft Penal Code of China with the Indian Criminal Code was made by A. Sabonadiere in this *Journal*, Third Series, vol. iii, pt. i, p. 69.

of committing a crime, such a person may be sent to a reformatory.[1] The rule *ignorantia juris neminem excusat* has only a modified application in Chinese criminal law, for it is laid down that " ignorance of law does not render an act unintentional (and therefore normally, unpunishable) ; but the prescribed punishment may, on account of the nature and circumstances of the case, be reduced by one or two degrees. The right of self-defence, providing the means used are proportionate, is recognized in Art. 15, and the plea of necessity, to avoid an imminent danger, under the same conditions, in Art. 16. Attempts are punishable only when the Code specifically enacts it. The recidivist receives a chapter to himself. He renders himself liable to a punishment increased by one degree for an offence once repeated, and by two degrees for more than one repetition. Chinese law recognizes only principals and accessories in the commission of a crime. A principal includes a joint offender, an instigator, an instigator of an instigator, or one aiding a principal in the commission of an offence. Accessories include those who aid a principal before the offence, and their punishment is two degrees less than that of the principal. In all there are five degrees of imprisonment, excluding imprisonment for life, and detention up to two months. Other punishments include death, a fine, deprivation of civil rights, and forfeiture of certain kinds of property.[2] Several chapters contain rules for the reduction or increase of punishments, according to the circumstances—matters which in England are usually left to the individual judge to decide. Chapter XV contains a list of periods of prescription, after which the right to prosecute terminates.

Of the specific offences contemplated in the Code, only one or two need be mentioned. Chapter IV,[3] entitled " Offences against Friendly Relations with Foreign States," is interesting, because it inflicts severe penalties on those who violate the special privileges of foreign sovereigns or ambassadors, or who commit unauthorized unfriendly acts against states, *e.g.* dishonouring the flag of a foreign state. The conduct of elections is strictly regulated in Chapter VIII, and Chapter XXI deals with opium, Art. 266 making it a crime to manufacture, sell, or retain or import opium. Gambling is also prohibited, being punished by a fine.[4] In view of the disputes over cases of homicide involving Europeans prior to the regulation of extraterritoriality by treaty provisions, the chapter on homicide does not seem altogether satisfactory. Art. 311 declares: " Whoever commits the offence of homicide shall be punished with death or imprisonment for life or for a period in the first degree." This includes a duel which ends fatally. An extensive duel may also be considered a riot. Where a person causes death or injury to another through negligence, he may be punished by a fine, varying with the degree of injury. A similar offence against an ascendant is punished by imprisonment. Art. 326 states : " Whoever fails to give the necessary

[1] Art. II.
[2] Usually forbidden or illegal articles.
[3] Arts. 118–53.
[4] Chapter XXII.

attention to his occupation and in consequence causes death or injury to any person, shall be punished with imprisonment for a period not severer than the fourth degree or detention, or fine of not more than two thousand *yuan*." This is an elastic and unsatisfactory article. Under it, German doctors in Tientsin, since the War, have found themselves liable, even though they had exercised all possible care and were professionally efficient. Fraud as a crime is defined very widely. " Whoever by means of false pretences or intimidation causes any person to deliver property to him with intent to make it his own or the property of a third party, commits fraud." Similarly a person who in the same way obtains or causes a third party to obtain an unlawful interest in any property, and also a person who, with intent to benefit himself or a third party, or to injure his principal, acts in any way contrary to his duties in the management of the affairs of the principal and causes damage is criminally liable.

As far as criminal procedure is concerned, the first problem which presents itself is that of dividing original jurisdiction between the High Courts and the District Courts. The High Court has original jurisdiction in the following cases: (1) Where the offence is against the internal security of the State. (2) Where the offence is against the external security of the State. (3) Where the offence is against friendly relations with foreign States.

The remaining jurisdiction, except for certain special offences reserved to the Court of Cassation, is said to be divided between the Local Courts and the District Courts.[1] There is some difficulty here, for the Local Courts are elsewhere said to be abolished.[2] An individual accused of crime is summoned by writ to attend at Court on a given day. The writ must specify the name, address and any distinctive features of the accused; the offence with which he is charged, the time and place of the investigation, that he may be arrested if he fails to appear, and the office from which the writ is issued. An accused who fails to appear without a proper excuse may be arrested. Since the preliminary investigation is usually held at the earliest possible moment, this, in effect, gives a guilty person little time to make his escape, and Art. 49 declares that an accused with no fixed abode may be arrested without previous summons, as may also anyone who is charged with a capital offence or with one involving imprisonment for life, or in the third degree, or who is suspected of absconding, or in cases where destruction, forging, or alteration of evidence, or conspiracy with any co-offender or witness is apprehended. Warrants for arrest must contain details of the prisoner and his offence, and are executed by the judicial police, and must be shown to the accused. They are issued by a procurator during preliminary investigation and by a judge during preliminary examination, and trial. Any person may arrest an offender detected *in flagrante delicto*.

[1] *Regulations Relating to Criminal Procedure*, Peking 1923, Art. 17.
[2] *The Law of the Organization of the Judiciary*, Peking 1923, Arts. 1–4.

As far as the actual trial is concerned, Chinese criminal procedure follows the normal continental form rather than the English. There is the preliminary investigation by a procurator or judicial police officer, to whom are committed full powers necessary for the investigation. When the preliminary investigation is completed, there is a preliminary examination to decide whether the accused is to be committed for trial or not. Then follows the public prosecution. There is also a procedure by private prosecution for certain classes of offences. Where the Chinese, in common with the continental system, differs fundamentally from our own, is in the nature of the examination and trial. In England, judicial proceedings are limited to an investigation whether a specific individual has committed the crime or not. Under the other system, a general investigation into the crime, including an examination of anyone likely to furnish useful information, is contemplated.

It must necessarily be stated that at present neither the criminal law nor the criminal procedure here discussed is generally enforced in China, and in the remoter areas, the inquisitorial methods of the Imperial régime, together with portions of the old Codes, are still enforced. In others again, some variety of martial law prevails.

Commercial Law.—The modern commercial law of China may be found in several publications of the Chinese Commission on Extra-territoriality. These publications include a volume of regulations for commerce, the Trade Mark law, and the Chinese Supreme Court Decisions. They cover a wide field. The last-named publication would have gained in value had a brief account of the case preceded the principle of law contained in it. As it is, the form is that of a digest, full of brief extracts, the precise application of which is left to speculation. Since formerly in China commercial law was made up of mercantile custom, the present law shows ample evidences of the fusion between Chinese custom and the modern interpretation of Roman commercial law. The Chinese theory of a corporation differs from the English theory and follows the French Code fairly closely. Art. 1 of the Commercial Associations Ordinance declares: "An association within the meaning of this Ordinance is a body corporate formed for the purpose of carrying on commercial transactions." There are four kinds of associations, all of them juristic persons. They are: (1) Société en nom collectif; (2) Société en commandite; (3) Société anonyme; and (4) Société en commandite par actions.

The first corresponds to a certain extent with an English partnership, trading under the names of the partners, and it may be formed of two or more persons. It must be registered with various particulars, and Articles of Association governing the rights and duties of its members in relation to the association is prepared. It may be dissolved, under the direction of one or more liquidators. The second form of association corresponds roughly with a limited partnership, being formed of members of limited and unlimited liability. A "société anonyme" must have

at least seven promoters, who must draw up and sign the Article of Association. The liability of all members is limited to the extent of their share. Though many of the details differ, the general form of this association is that of the limited liability company. The "société en commandite par actions" is composed of one or more members of unlimited liability and shareholders who are liable to pay only the amount of their subscriptions. To this extent, therefore, it resembles the "société en commandite," and it is provided that the rules applicable to the latter shall apply also to the "société en commandite par actions" in the following respects: (1) The relation between members of unlimited liability and the association; (2) The relation between members of unlimited liability and third parties; (2) The retirement of members of unlimited liability.

In all other cases, except where special provisions apply, the provisions applicable to the "société anonyme" are applicable to the "société en commandite par actions."

A considerable portion of the commercial Code relates to Chambers of Commerce and the Arbitration Courts of Commerce attached to them. All Chambers of Commerce are juristic persons, and must contain at least fifty members. Their functions are defined by Statute, and they are dissolved by liquidators, after a resolution by a two-thirds majority of not less than three-fourths of the members. Arbitration by the Court of the Chamber of Commerce may be a result of joint application of the traders concerned, or by direction of a Court of Justice. The present condition of insecurity in China makes procedure by arbitration in many cases preferable to litigation.

The Supreme Court decisions clearly illustrate the Roman bias of the judges. The method of arrangement in the first part roughly follows that of the "Institutes." The following rule requires no comment concerning its origin: "If a person who manages the affairs of another without mandate or right or obligation acts in conformity with the actual or presumable intention of the principal and in a way most beneficial to him, such person is entitled like a mandatory to sue the principal for reimbursement of expenses with interests and for indemnity against obligations incurred." Concerning torts, it is enacted: "A person who wilfully or negligently unlawfully infringes the right of another is bound to pay damages for any injury caused by the infringement," and again: "The right to sue for damages in tort depends on damage having actually been suffered. If absolutely no damage has been suffered, there can be no question of damages."

It should not be forgotten that China has adopted certain "Rules for the Application of Foreign Laws," and has also adopted special rules of procedure for citizens of powers not enjoying extraterritorial rights in China.

The Abolition of Extraterritoriality.—Extraterritoriality in China now depends upon the Washington Conference Resolutions. In those

resolutions the powers promised to abolish extraterritoriality when the condition of Chinese law justified the step. They also promised to co-operate with China in the task of reforming Chinese law. At the present moment, the Extraterritoriality Commission is completing its survey of the administration of Chinese law, and it is impossible to anticipate its conclusions. At the same time, one or two general conclusions emerge from a survey of Chinese law to-day. The first is that the law, on paper, is rapidly becoming, if it has not already become, adequate for the needs of a modern state. The second is that the law which is actually administered falls a long way below the written Codes in quality. Even the fundamental maxim that a man shall not be punished except for an offence definitely prohibited by law, is not infrequently ignored.[1] Moreover, the Chinese Constitution has not yet assumed a final shape, and the Chinese Government itself is unequal to the task of maintaining order throughout its territories. Until it can do that efficiently, abolition, or even substantial modification, of extraterritoriality is premature, and would indeed be an injustice to Europeans in China. There is at present an earnest desire among educated Chinese to place their law on an equality with that of the West, and when the abnormal military conditions no longer prevail, they will undoubtedly succeed.

[1] The following observations deserve full consideration: "Though China is endeavouring to improve her judicial, police and prison system, she is still far from approaching Western standards in these important matters. Torture of prisoners to extort confession, and other flagrant abuses, still exist; there is no responsible judiciary; corruption is rife; unduly severe punishments are meted out and prison conditions are deplorable." (*Report of the Hong Kong General Chamber of Commerce for* 1925, p. 9.)

THE MAIN FEATURES OF THE CONSTITUTION OF THE GERMAN REICH OF 1919 COMPARED WITH THE CONSTITUTION OF 1871.[1]

[*Contributed by* Dr. B. H. Jaup, *Berlin.*]

The constitution of the German Reich, in force since 1919, is distinguished from the preceding constitution, which came into operation in the year 1871, not only by the alteration of the form of government, which has been turned from a monarchy into a republic, but also in many other respects. Still, there are a few principles which are applicable to both constitutions, and it may be worth while putting down the chief characteristics of the present constitution and comparing them with the corresponding principles of the former one.

With regard to the political structure of the German Reich, it must be said that the present constitution has taken a further step towards the creation of a unified state (*Einheitsstaat*).

The constitution of the German union of 1815 brought about a union of several states under a central power, connected with each other by the pursuit of political, economic and other common objects without giving the central power a dominating position at the expense of the independence of the united states. The constitution of the German Reich of 1871 went a step further by creating a regular confederated state, that is to say, a state composed of a number of single states, to which the single states are subject and in favour of which they had to give up a certain amount of their independence. The present constitution goes further on the same lines in strengthening the superior state —that is the Reich—to such a degree, that a large part of the independence of the single states, which they held according to the former constitution is absorbed by the Reich.

The present constitution prescribes that the single states must have a republican constitution, that the right of election to their parliamentary bodies must be of the same kind as it is in the Reich. With reference to the fact that the liberty of the single states to deal with their affairs relating to the important matters mentioned above has been curtailed

[1] Authorities cited:

1. *Das Staatsrecht des Reichs und seiner Länder.* Dr. Otto Meiszner, 2 Auflage, Berlin, 1923.

2. *Die Verfassung des deutschen Reichs* 1871.

3. *Die Verfassung des deutschen Reichs* 11 *August*, 1919, *mit Erläuterungen.* Dr. Gerhard Anschütz, Berlin, 1921.

considerably, the question has been raised as to whether the single states still possess the qualities which are essential to a state or whether the German Reich has completely absorbed their rights and entered the stage of a unified state. We shall see that this is not the case, and that the type of the German Reich as a confederated state has not been altered by the present constitution. Although theoretically the competence of the Reich to take over the management of the affairs of the single states (which is left to them in the meantime) is unlimited, they still have powers, which they exercise by virtue of their own rights. The fact that the single states exercise these rights as their own and not as being derived from the Reich is the characteristic which constitutes a state and is essential to its being. It is not the greater or less degree of independence of a state.[1]

The strengthening of the power of the Reich at the expense of the power of the single states is a striking feature, which permeates the whole constitution with only one exception to be mentioned afterwards. It is made evident by the abolition of certain privileges of the single states, which related to military affairs, to traffic and to the relations with foreign powers. These important tasks have been transferred to the Reich and put on uniform lines by it.

An essential characteristic of the present constitution and one which distinguishes it fundamentally from the former one is the principle laid down in Art. 1, that the power of the state proceeds from the people. According to the constitution of 1871 the power of the state proceeded from the sovereigns of the single states, who had concluded an eternal mutual alliance for the protection of the territory of the union and for the promotion of the welfare of the German people, as it was said in the preamble of the constitution. The political foundations of the German Reich have been altered radically by the power of the state having been transferred from the confederated sovereigns of the single states to the whole German people. That this leading principle has been carried through by the constitution is proved in a great many of its provisions.

In Art. 2 it is said that the territory of the Reich is composed of the territories of the single states. At first we consider the means provided by the constitution to effect a change of the frontiers of the Reich, which does not imply a change of the territories of the individual states. The second sentence of Art. 2 states that foreign territories can be taken into the Reich by a law passed by the Reichstag, if their population by virtue of the right of self-determination desires it. The difference between the former constitution and the present one is, on the one hand, that according to the latter an ordinary law is sufficient, whereas formerly a special act implying an alteration of the constitution was necessary, which had to be passed by a qualified majority of votes. On the other hand, a further condition is imposed by the present con-

[1] Anschütz, Article 1, No. 3.

stitution, namely, the desire of the population concerned to be taken into the territory of the Reich, this desire to be expressed by virtue of the right of self-determination. Therefore, annexations of foreign territory made against or without the will of the population concerned are contrary to the terms of the constitution.

A change of the territories of the individual states, which does not affect the territory of the Reich, is dealt with by the constitution in a peculiar way, which is most characteristic of the application of the main principle of the constitution that the power of the state proceeds from the people. According to the former constitution the existence of the twenty-five confederated states which were all mentioned by name in Art. 1 of the constitution was guaranteed by it. If one of those states intended to leave the confederation in which it was included or to join another of the confederated states, giving up its own existence as a state, an alteration of the constitution was necessary to bring about the intended effect, which in this case could not be obtained otherwise than by the formation of a new confederation between the sovereigns of all the confederated states. If the question was a change of the frontiers of the territories of several states, a contract between the governments of the states concerned was sufficient according to the former constitution. In both cases the Reich had nothing to do with the matter.

That nowadays the power of the state is based on the will of the people as a whole is made clear by Art. 18 of the present constitution, according to which the formation of new states within the Reich as well as alterations of the territories of the single states can be effected by virtue of the will of the people or by the Reich—even against the will of the governments concerned. Generally a constitutional law—that is a law passed by a qualified majority of votes—is required for it. An ordinary law which is passed by a simple majority of votes is sufficient, if the governments of the respective states agree to it or if—without such a consent—the alteration is demanded by the population of the territories concerned, and if the paramount interests of the Reich require it. The will of the population has to be ascertained by vote.

The power of the state expresses itself chiefly in the compulsion which it exercises over its subjects. The compulsion of the state affects its subjects by laws, which they have to obey. It is, therefore, our task, in order to be enabled to give further proof of the will of the people being the basis of the power of the state, to examine the influence which the people hold in making the laws of the Reich. Usually the people do not act themselves in the state, but they elect from their own numbers representatives, who form the parliamentary body of the Reich.

The Reichstag.—The parliament of the Reich is called the Reichstag. Its members are elected by men and women, who are twenty years of age or over, by a general, equal, direct and secret vote according to the principles of the proportional system (Art. 22). The Reichstag is the most powerful body of the Reich. It has the greatest share in making

the laws of the Reich. The laws are decided on by the Reichstag, as it is stated in Art. 68 of the constitution. According to the former constitution, consonant decisions of the Reichstag and the Bundesrat were required for bringing about a law, whereas according to the present constitution a bill becomes a law on the decision of the Reichstag alone. Against its decisions the Reichsrat has the right of protestation (Art. 74).

Referendum of the People.—An important innovation introduced by the present constitution is the institution of the so-called referendum and the legislative initiative of the people, by which a direct influence on the legislation of the Reich has been given to them.

First the President of the Reich has it in his power to submit to the vote of the people any law which has been decided upon by the Reichstag before it is passed. Besides this power, members of the Reichstag who do not agree with a law decided on by its majority, can call upon the people to vote on it, if at the request of these members—they must form at least a third of the members—the passing of the law has been suspended.

The object of these members is to rouse the people to take an interest in the law, to turn their opinions against it, and as to the final purpose to induce them to make a formal demand for a general vote upon the law. For such a demand is the further condition imposed by the constitution for bringing about a referendum. If this demand has been made by the certain number of the people prescribed by the constitution, according to which they must form at least the twentieth part of the total electorate, the condition for the referendum is fulfilled and it has to take place then. All persons who are entitled to vote can take part in the referendum. The referendum is decided by the majority of the voters. Above all, it must be remembered that to effectuate a referendum in the way described is only possible if the passing of the Bill concerned has been suspended at the request of at least the third part of the members of the Reichstag.

The greatest power to influence the legislation has been given to the people by their right to put forward a bill themselves. In this case the people who have the right to vote take the legislative initiative by proposing a Bill relating to a certain matter, which, as they might have expected, should have been brought forward by the Government or the Reichstag. The Bill must be drawn up in all details and supported by a number of the people forming at least one-tenth of the total electorate, those people demanding the Bill to be submitted to the Government. The contents of the Bill must be detailed and clearly defined, lest a short phrase or a vague idea, for which votes could be easily obtained, should be put to the vote. It must be clearly perceived what the petitioners really drive at. The proposed Bill is to be submitted to the Reichstag by the Government, for the Reichstag is to decide upon it. It is remarkable that the referendum only takes place, if the Bill has been rejected, or not been accepted unaltered by the

Reichstag, the idea being that the putting into practice of the referendum should be made more difficult, so as not to deprive the Reichstag of its functions as the chief legislative body.

Thus the referendum which proceeds from the request of the members of the Reichstag is clearly distinguished from the referendum, which results from the will of the people themselves. So far only one referendum, which originated in the legislative initiative of the people, has been resorted to; this occurred in June 1926, when a Bill urging the confiscation of the property of the former sovereigns of the German States was rejected by the vote of the people.

The Reichsrat.—The Reichsrat is the successor of the former Bundesrat. It is the representative body of the individual states in the legislation and administration of the Reich (Art. 60). The members of the Reichsrat are representatives of the governments of the single states. Their number depends on the number of inhabitants of the state, whose government they represent. The power of the Reichsrat, however, has been considerably curtailed as regards the legislation of the Reich, as has already been mentioned.

President of the Reich.—The President of the German Reich holds a position, which as regards influence lies between the position of the President of the French Republic and of the President of the United States of America. Like the President of the French Republic he is elected to his office for a period of seven years, not, however, by the parliamentary body as is the case in France, but by the people themselves. But he exercises, especially in legislation, many more rights than the French President. On the other hand, he does not occupy the predominating position of the President of the United States of America, to whom the executive power has been transferred to its fullest extent, nor is the Government of the German Reich responsible to the President—as is the case according to the constitution of the United States—but to the parliament.[1]

As has been stated already, the President of the German Reich is elected to his post by all the German people, as far as they are entitled to vote, for a period of seven years. Every German who has reached the age of thirty-five is eligible. The President of the German Reich may be deposed by a vote of the people, provided that a resolution of the Reichstag relating to this matter passed by a majority of at least two-thirds of its members has preceded the vote. That resolution is to be submitted to the people to vote on it. If it is rejected by the people, it is made clear that the people support the President of the Reich in contradiction to the Reichstag. The latter is said to be dissolved as the consequence of the vote of the people, while the President of the Reich is considered re-elected for another seven years (Art. 43).

The most important task of the President of the Reich is to form the

[1] Anschütz, pp. 97–98. Meiszner, § 15.

Government of the Reich. He nominates the Chancellor of the Reich, and, according to the latter's suggestions, the Ministers of the Reich. His choice of these persons is, however, confined to those who possess the confidence of the Reichstag. He is obliged to discharge them, if the Reichstag withdraws its confidence from them by an express decision.

The President of the Reich acts on behalf of the Reich as regards relations with foreign states. He accredits and receives ambassadors. He concludes alliances and treaties with foreign powers on behalf of the Reich. For the declaration of war and the conclusion of peace, however, a law passed by the Reichstag is required (Art. 45). This is an innovation in comparison with the former constitution, according to which the Kaiser could do this without the interference of the Reichstag, only requiring the consent of the Bundesrat, unless an attack on the territory of the Reich had been made. The President of the Reich has the chief command over the army and navy of the Reich.

The right of taking measures which may affect the life of the country most profoundly is conferred on the President of the Reich, should public safety and order be seriously endangered in the Reich. In this case he can take all measures which he thinks necessary for the restoration of public safety and order and can to this end issue orders, which usually can only be issued through the regular channels of legislation. In such circumstances he is entitled to suspend important rights of German subjects guaranteed by the constitution. The measures thus taken must be repealed at the request of the Reichstag (Art. 48).

The President of the Reich has the right and the duty to sign and to make public the laws passed by the Reichstag in accordance with the constitution (Art. 70). All the orders and decrees of the President of the Reich require the additional signature of the Chancellor of the Reich or the competent minister in order to be valid. Such ministers or the Chancellor of the Reich incur responsibility by their signatures. This is the republican transformation of Art. 17 of the former constitution, in which it was said that all orders and decrees of the Kaiser required the signature of the Chancellor of the Reich in order to be valid.

Government of the Reich.—The Government of the German Reich consists of the Chancellor and of the Ministers of the Reich. The fundamental innovation in comparison with the former constitution is the so-called parliamentary government-system. It is based on the provision of the constitution that the Chancellor and the Ministers of the Reich require the confidence of the Reichstag in order to hold their posts. They have to resign if the Reichstag withdraws its confidence from them by a vote *ad hoc* (Art. 54).

Position of Prussia in the Reich.—The predominating power which, according to the former constitution, Prussia held within the Reich has been wholly abolished by the present constitution. The hegemony of Prussia in the Reich was founded on the fact that the Kaiser was also King of Prussia, that the post of Chancellor of the Reich and that of

the Prime Minister of Prussia were united in one person, and that Prussia presided in the Bundesrat. According to the present constitution an impartial member of the Government of the Reich presides in the Reichsrat without having the right to vote. The connexion of Prussia with the leading position of the Reich and the personal identity of the Chancellor of the Reich with the Prime Minister of Prussia have also been abolished. But although Prussia has been deprived of her political prerogatives, her real predominance resting on the size of her territory and the large number of votes she has in the Reichsrat still exists under the present constitution. This fact taken together with the complete political separation of the Government of the Reich from the Prussian Government, which has executive powers throughout the largest part of the Reich, means a considerable weakening of the power of the Reich, a strange feature in the constitution, the spirit of which is characterized by an extensive strengthening of the power of the Reich at the expense of the single states.

HABEAS CORPUS IN RESPECT OF DETENTION ON A FOREIGN MERCHANTMAN.

[*Contributed by* PROFESSOR A. H. CHARTERIS, M.A., LL.B., *Challis Professor of Public Law in the University of Sydney.*]

IN 1922 an application in New South Wales for a rule *nisi* for a writ of *habeas corpus* raised incidentally the important question (on which the Court did not feel called upon to pronounce) of the validity in British territory of the detention of aliens on a French merchant ship in virtue of an order of transportation to a French penal settlement pronounced by a French criminal court.

The circumstances were as follows:

George Tulop and Istvan Szibér (whose nationality is not specified in the report) were convicted in France of certain offences under the French Military Code—the former of desertion from the French Army and the latter of resisting the French occupation of Hungarian territory—and were ordered to be transported to the penal settlement at Noumea in New Caledonia. The prisoners were shipped at Marseilles in custody of the French military authorities on board the French mail-steamer *El Kantara*, which, in the course of her voyage, called at Newcastle, New South Wales, in May 1922. There the prisoners escaped from custody and made their way ashore. The escape appears to have been notified by the master to the Newcastle police, who shortly afterwards arrested the escapees on board an Italian merchantman lying in the harbour on which they apparently hoped to return to Europe. The *El Kantara* had meanwhile proceeded on her voyage.

The prisoners were brought before the police court at Newcastle, charged with vagrancy, and remanded for one week. By arrangement with the French Consul the prisoners were brought from Newcastle under police escort before the remand expired, and handed over to his representatives, who placed them in the custody of the master of another French mail-steamer belonging to the same owners and bound for the same destination as the *El Kantara*, viz. the *Pacifique*, then lying in Sydney harbour.

It is to be noted that unless the prisoners came (as is probable) within the definition of "prohibited immigrant" in s. 3 (*g*, *a*) of the Australian Immigration Act, 1901–20 (then in force), viz.:

> any person who has been convicted of a crime and sentenced to imprisonment for one year or more, unless five years have elapsed since the expiration of the term for which he was sentenced,

they were, in fact, not prohibited immigrants at the date of the application. Statutory means existed, however (although none had been

used), for dealing with them, and even of making them prohibited immigrants. Thus as persons who had clearly entered the Commonwealth in evasion of the Act, they were liable under s. 7 on summary conviction to imprisonment and deportation; under s. 5 they might be required to pass the "dictation test," and, on failure to do so, were to be deemed prohibited immigrants; under s. 9 their mere entry into the Commonwealth in that character involved the master, owners, agents and charterers of the vessel by which they came in joint and several liability to a fine of £100 for each entry. No steps, however, had been taken under the Act by the Federal authorities who are charged with its enforcement.

Incidentally it may be added that the French ship-owners had not availed themselves of the provisions of The Mailships (France) Order in Council, 1892, made under the Mailships Convention Act, 1891,[1] in respect of either of their vessels, which were therefore merely foreign merchantmen temporarily within British territory, not differing in legal position from the Italian vessel in Newcastle harbour on which the arrest of the escapees had been effected by the New South Wales police.

The escape and arrest aroused some indignation in Labour circles in Newcastle, owing to the rumour that the prisoners were Communists whom the French Government had punished for their political opinions, and an attempt was made to contest the validity of their detention. Less than an hour before the *Pacifique* was due to sail from Sydney on May 18, application was made to the Supreme Court of New South Wales on behalf of the prisoners by H. H. Sutherland, describing himself as "organizer," Newcastle, for a rule *nisi* for a writ of *habeas corpus* directed to A. Desbordes, the master of the *Pacifique*, calling upon him to deliver up the prisoners. The application was made by counsel, who had been briefed at the shortest notice, and was supported by an affidavit sworn to by a Sydney solicitor, which not only contained no averment that the master was acting without lawful authority, but in effect stated a case for the respondent by setting forth the prisoners' conviction in France, their escape, re-arrest and remand at Newcastle, and their transfer to Sydney and delivery to the respondent. The only allegation supporting the application was that the prisoners had not been sentenced by any Court in New South Wales and had not been ordered to be deported.

The Full Court, which suspended the hearing of another matter in order to deal with the application, refused the rule, the argument having been of the briefest.

After stating the facts disclosed in the affidavit, Sir William Cullen, *C.J.*, observed:

it also appeared that there had not been any order of any Court made here for detaining them (the prisoners) in custody or for deporting them. I fail

[1] Order of October 16, 1894, applies the Act to New South Wales (Stat. R. & O. Rev. X, Post Office, p. 106). Cf. *B.Y.I.L.*, 1920–1, p. 67.

to see any information here on which the Court would be able to pronounce even *prima facie* that the custody in which these men are is illegal. Our law recognizes the legality of the detention of convicted criminals under the law of any friendly power. What has happened upon a ship of that nation which merely called at an Australian port on its voyage to a place of detention belonging to the same power, seems merely to amount to this, that having escaped on shore at a New South Wales port under circumstances apparently bringing them into conflict with the Immigration Restriction laws of the Commonwealth, and being found by the police, they were arrested on a charge of vagrancy, and afterwards handed over to a French ship sailing to New Caledonia, apparently, in pursuance of the French Government's authority, to take them on from Sydney to Noumea. If there were anything to show that the master of the French ship was acting without authority under the French law, then the question might arise whether there was any authority under Australian law for his keeping the men on board in Australian waters, assuming the decision in *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272 or the Immigration Restriction Act to present no obstacle to proceedings for *habeas corpus*, but no such information is supplied. Apparently it is an application made simply to forestall the departure of these men in the ship, the master of which is *prima facie* acting under legal authority. For these reasons it would seem that the rule *nisi* must be refused.

Gordon and Wadd, J. J., concurred. Rule *nisi* refused.

Comment.—The present case resembles in many points the well-known Anglo-French case of Savarkar at Marseilles 1910, which led to an arbitration before the Permanent Court of Arbitration (see J. B. Scott's *The Hague Reports* (1916), 274 ff.), with the important difference that the flag-state of the foreign vessel was not in any way involved. In each case a prisoner lawfully detained under the law of the flag-state escaped from a merchant vessel at a foreign port of call and, by an irregularity on the part of the local police, was restored to custody—in Savarkar's case, to that from which he had escaped; in the present case, to custody on a different vessel belonging to the same owners. The main difference is that after Savarkar's departure from France on the ss. *Morea*, the French Government demanded restitution from Great Britain of the fugitive on the ground that his delivery to the British officers on board the vessel was contrary to the rules of international law. In the somewhat peculiar circumstances of the case, this claim failed before the Arbitration Tribunal, which found that, while an irregularity was committed in Savarkar's arrest and delivery to British police, there is no rule of international law which imposes under these circumstances any obligation on the Power which has the custody of the prisoner to restore him because of a mistake by the foreign agent who delivered him up. In the present case no French official intervened at all, except that representatives of the French Consul received the arrestees from the Newcastle police and conveyed them on board the *Pacifique*. Finally Savarkar's case did not raise the

question of the legality of the prisoner's detention on a foreign vessel in a French port.

As a matter of English law, the question here presented appears to be novel. The *Canadian Prisoners' Case* [1839] 5 M. & W. 32 (115 Eng. Rep. 15) is not in point since the validity of the original detention in that case turned on the powers conferred by a British Statute, and the ship which conveyed the prisoners from Canada to Liverpool when under order of transportation to Van Diemen's Land was presumably a British ship, being named the *Captain Ross*. Similarly, *R.* v. *Lesley*, [1860] Bell C.C. 220 is not concerned with a foreign ship.[1] The nearest analogy which the Court might perhaps have used is the statement in Hall's *Foreign Jurisdiction of the British Crown*, p. 81.

> On one important point custom is decisively settled. If a person on board a British ship commits a crime on the high seas and is brought in custody into a foreign port, the territorial authorities will not interfere with his being kept in custody nor with his being transferred to another vessel for conveyance to England.

The present case is *a fortiori* of that figured by Hall.

On the other hand, in view of the *dicta* of Sir R. Phillimore in *R.* v. *Keyn*, [1876] 2 Ex. D. 63, 82, there seems to be no doubt that a British Court has jurisdiction to test by an appropriate application for *habeas corpus* the validity of a foreign order for detention enforced on a foreign vessel while in a British port. The statement of the Chief Justice above quoted: "Our law recognizes the validity of the detention of convicted criminals under the law of any friendly power," must not (it is conceived) be taken as recognizing a presumption of validity in favour of a foreign merchantman excluding the possibility of inquiry. On the contrary it must be read in the light of the facts before the Court.

[1] *The Sitka* (1856) was treated as a public vessel of war, although a captured merchantman in the possession of a British prize-master and crew (see Hall: *International Law* (8 Ed.), 243.

THE LAW OF MOVING PICTURES IN GERMANY.

[*Contributed by* Dr. Fritz Smoschewer, *Landgerichtsrat in Berlin.*]

Copyright. Protection of Literary Works against Exploitation in Moving Pictures.—The regulations upon this matter are to be found in the Law concerning the Copyright of Literary and Musical Works of June 19, 1901 (*Reichsgesetzblatt*, 1921, p. 227), and in the amended law of May 22, 1910 (*Reichsgesetzblatt*, 1910, p. 793).

In s. 11 the Law confers on the author the sole right to multiply the work in question, to bring it into commercial circulation, and to produce it in public. According to s. 12 this exclusive right also covers all adaptations (*Bearbeitungen*) of the work. Under this term are to be included: translations, retranslations, dramatizations and above all (No. 6): "the exploitation of a literary work for the purpose of a pictorial representation which reproduces the substance of the original work by means of cinematography or by any similar process." S. 13 then lays down that "Notwithstanding the exclusive rights appertaining to the author, according to s. 12, Art. 2, the free utilization of his work is permissible if by that means a new and distinct work is created."

The recasting of a literary work in the form of a film is accordingly regarded by the Law as an "adaptation," or *Bearbeitung*. This is defined as "Any modification of a work which leaves its identity in the main untouched." [1] It stands in contradistinction to *freie Benutzung*, which we may render as the "free utilization." To find the correct criterion between the two constitutes one of the most difficult problems; it is one which recurs in a similar form in the copyright law of all countries. German jurisprudence has not yet found a consistent formula. Goldbaum's definition [2] is, perhaps, the best. According to him there is "adaptation" whenever the original work can be still recognized in the form into which it has been recast. This definition depends less on logic than on æsthetic feeling, but, in the long run, it is precisely æsthetic feeling which must always govern the decision in estimates of this nature. The *Reichsgericht* has reckoned with this fact in making the distinction turn upon the answer to the question: "Whether the author of the latter work has freed himself from the conception and

[1] Allfeld, *Urheberrecht und Werken der Literatur und Tonkunst* (Munich, 1902), p. 124.

[2] Goldbaum, *Urheberrecht und Urhebervertragsrecht* (Berlin, 1922), p. 153.

the ideas of the earlier author to such an extent that it seems fair to regard his work as an independent literary production." [1]

Upon this principle, the representation of a literary work in moving pictures can never be looked upon as being merely a performance of the work, but must be considered as an " adaptation," *i.e.* a modification of that work. This is important because, according to s. 2 of the Law mentioned, the adaptor enjoys separate protection, even if he made the adaptation without the consent of the author of the work adapted. In this case the rights of the literary author are concurrent with those of the adaptor. The exclusive rights in the illicit adaptation belong both to the author and to the adaptor. The illicit adaptation can therefore only be exploited with the consent of both.

On the other hand, it is open to question whether a moving picture must, in every case, be regarded merely as an adaptation. The unfortunate drafting of s. 13 of the Law mentioned has, in fact, led to the following controversy: Some writers [2] assume that the particular forms of adaptation specified in s. 12, Art. 2, particularly translation, dramatization and cinematographic reproduction, must always be regarded as being mere adaptations, and not as " free utilizations," even though they differ essentially from the original work. These writers are therefore of the opinion that the literary copyright extends even to those moving pictures in which the work in question has been utilized in a perfectly free and original manner. On the other hand, we ought probably to adopt the contrary opinion of other writers,[3] and to accept their view that a moving picture is subject to the exclusive rights of the literary author only when his work, taken as a whole, is recognizable in the moving picture.

Finally, the provisions in s. 14 of the Law referred to are very important, as also are those in s. 2 of the Law concerning the Right of Publication, June 19, 1901 (*Reichsgesetzblatt*, 1901, p. 217). According to these provisions, the author of a literary work, in the absence of a mutual agreement to the contrary, still retains his cinematographic copyright when he assigns his copyright (*i.e.* the literary copyright) to another person, or when he executes a " Contract of Publication."

Copyright in the Moving Picture Itself.—A film lies on the borderline between literature and pictorial art: a dramatic plot, which is really a literary work, is reproduced by means of a series of pictures. This creates difficulties in German law, because literary copyright is regulated by the law of June 19, 1901, previously referred to, whereas pictorial copyright is regulated by the Law concerning the Copyright of Works of Art and Photography of January 9, 1901 (*Reichsgesetzblatt*, 1907, p. 7), and the general provisions of these two laws differ to some extent from one another. By the Law of May 22, 1910, the

[1] *Entscheidungen des Reichsgerichts in Zivilsachen*, Band 82, p. 17.
[2] *E.g.* Goldbaum, p. 159.
[3] Particularly Elster in *Gewerblicher Rechtsschutz und Urheberrecht*, 1912, p. 364.

following section (s. 15*a*) has been introduced into the Law for the Protection of Art of 1907 :

> Although a work produced by means of cinematography or by some similar process may be regarded as an original creation, on account of its adaptation for the purposes of the stage or of the rearrangement of the incidents represented, nevertheless the author's copyright extends also to the pictorial reproduction of the plot thus presented in a modified form. The author has the sole right to produce the work in public.

Even before this amendment, the separate photographs of the film-strips, as such, were protected by s. 15. The new s. 15*a* was intended to protect, not the separate pictures, but the plot represented. The plot, however, essentially constitutes a literary subject, and therefore, as explained by Goldbaum [1] and also by myself,[2] this clause ought properly to have been incorporated in the Law for the Protection of Literature of 1901.

Where there is a conflict between the general provisions of the two laws, preference must be given to the provisions of the Law for the Protection of Literature. This is of special importance in regard to the period over which the protection extends. In the case of photographs, for example, these are protected only for a period of ten years from the time of their publication, whereas literary works are protected for thirty years after the author's death.

Contracts Relating to Cinematographic Copyrights.—These contracts form a large and very difficult branch of jurisprudence, and they have involved a long succession of controversies. It is only possible to refer here to a few of the most essential points.

If the moving picture to be produced is based on a copyrighted literary work, the permission of the author or of his assignee or representative must be obtained. The question arises whether, in the absence of express terms, this permission extends only to one film production, or whether the manufacturer is also entitled to produce a second film from the same work, without fresh permission. I have myself [3] given a reasoned opinion, that the permission is valid for one film only. So far there have been no judicial decisions upon this point.

The contract between the author of a film-manuscript (scenario) and the film-producer, as to the production of a film from a manuscript, is regularly called the " Contract of Film-production " (*Verfilmungsvertrag*). The *Reichsgericht* has refused to apply the clauses concerning the Contract of Publication to the Contract of Film-production. It views the latter as a contract *sui generis* and declares that, in the absence of express terms, the producer is entitled only, but not bound, to produce a film from the manuscript.[4]

[1] *Urheberrecht und Urhebervertragsrecht*, p. 6.

[2] *Zeitschrift für Deutschen Zivilprozess*, November 1926.

[3] *Gewerblicher Rechtsschutz und Urheberrecht*, 1925, p. 327.

[4] *Entscheidungen des Reichsgerichts in Zivilsachen*, Band 107, p. 62 : *cf.* also *Le Droit d'Auteur* (Bern), 1925, p. 32.

A lively dispute exists as to the legal character of the contract between the film-producer and the film-distributor concerning the exploitation of the film. We have here, together with the complete or partial assignment of the copyright, the alienation of the film negative and of the film copies. Some writers [1] emphasize the copyright aspect of the contract, and treat the case as being essentially a transfer of copyright; whereas other writers lay more stress on the alienation of the material objects, and regard the contract as being either a contract of sale, or in certain circumstances a contract of lease.[2]

The *Reichsgericht* has expressed itself to the effect that the principles relating to exclusive Patent Licences are to be applied, *mutatis mutandis*, to the contract in question.[3] This decision, however, clears up only some of the questions at issue, while many others remain doubtful. In general, it would doubtless be correct to give most weight to the copyright aspect of the proceeding, but, nevertheless, in some particular connexions the principles relating to the alienation and assignment of material objects must be applied.

Lastly, a difference of opinion also exists as to the nature of the relations between the film-distributor and the theatre lessee or owner. There again, some writers lay more emphasis upon the copyright and others upon the film copy as a material object.[4]

I have elsewhere argued in favour of the view [5] that theatre lessees and owners acquire no copyright claims whatever against third parties, but that, on the contrary, the distributor renounces only his rights of prohibition against the theatre lessee or owner, and assigns to him, for the purposes of production, the film-copy free from the claims of any third parties. In this view the essential feature of the contract is the transfer of a material object; it is essentially an ordinary agreement of lease, in which the renunciation of copyright plays only a secondary part.

Censorship of Moving Pictures.—The censorship of moving pictures is regulated by the Law of Moving Pictures of May 12, 1920 (*Reichsgesetzblatt*, 1920, p. 953), amended by the Law of December 23, 1922 (*Reichsgesetzblatt*, 1923, p. 26, Part I). According to s. 1, films may be exhibited or distributed for the purpose of public exhibition at home or abroad only after they have been passed by the Public Examination Office. The permission to exhibit in public is refused, if the examination shows that the exhibition of the film would tend to endanger public order or security, to violate religious feeling, to exercise a degrading or demoralizing influence, or to jeopardize German prestige or Germany's

[1] *E.g.* Goldbaum, p. 109.

[2] Eckstein, *Deutsches Film- und Kinorecht* (Mannheim-Berlin-Leipzig, 1924), p. 308.

[3] *Entscheidungen des Reichsgerichts in Zivilsachen*, Band 106, p. 362; *cf.* also *Le Droit d'Auteur*, 1925, p. 19.

[4] In the first sense Goldbaum, p. 102, in the latter Eckstein, p. 203.

[5] *Zeitschrift für den Deutschen Zivilprozess*, November 1926.

relations with foreign States. The permission may not be refused on account of a political, social, religious, ethical or philosophical tendency *per se*. Nor can it be refused for reasons unconnected with the contents of the film.

These principles are greatly moderated by the "Theory of Counter-values" as developed by the Central Examination Office. This authority lays down that, in every moving picture, the values created by the management and by the performance of the actors must be weighed against its detrimental influence. The decision therefore depends not only upon the subject of the film, but also upon the manner of its presentation.

According to s. 3, films to the exhibition of which juveniles under eighteen years are to be admitted require a special permit. In addition to those films which are prohibited under any circumstances whatever, films from which a harmful influence upon the moral, mental and healthy development, or the development of an over-excited imagination, is to be feared, are to be excluded from exhibition before juveniles. Children under six years of age may not be admitted to an exhibition of moving pictures. Contraventions are subject to penalties.

FRENCH FISCAL LEGISLATION REGARDING THE CINEMA.[1]

[*Contributed by* M. Robert Kiefé, *Avocat à la Cour d'Appel de Paris.*]

The industry and art of cinematography are essentially French. The cinematograph was invented by a Frenchman—Louis Lumière—and was brought to perfection by French technical experts, and the industry of cinematography occupies to-day a very important place among French industrial activities, notwithstanding the unfortunate effect of the war upon French industries. But, apart from these purely national considerations, there are reasons of much more general interest which make it almost impossible to give too much attention to questions relating to the cinema.

M. Luchaire, the Director of the *Institut International de Coopération Intellectuelle*, has summed up these reasons admirably in his report upon the cinema presented in 1924 to the Commission of Intellectual Co-operation. He there wrote that the cinema is " a new and universal great art which merits the attention of all those who are concerned with the intellectual destinies of humanity."

What are in France the fiscal burdens laid upon the cinema ?

In the first part of this brief study we shall pass in review the taxes direct and indirect, general and special, which have to be paid by the owners of " picture-houses " in which films are exhibited to the public. In the second part we shall enumerate the taxes levied upon the cinematographic industry strictly speaking—that is, the industry devoted to the production of films, whether " virgin " or already printed ; and in the third part we shall study the possible effects of fiscal legislation upon the French industry, more particularly in the difficult struggle which it has to maintain against American competition.

I. The Fiscal Regime of Picture-houses.

A. Indirect Taxes.—In common with all public exhibitions in France, picture-houses are subject to special indirect taxes. These are :

(*a*) *The State Tax* (*L'impôt d'État*).—This tax was created in 1914, and the yield was originally ear-marked for purposes connected with the war. It was recast by the Law of December 30, 1918, and was finally brought into its present shape by Articles 92 and following of the Law of June 25, 1920–21.

[1] Translated by F. P. Walton, Esq.

It applies to all public exhibitions, and it divides them into four categories, the scale of taxation being different as to each. The categories are: theatres; music-halls; cinemas; dancing-halls. The tax is levied on the admission receipts, and must be paid after each performance.

The scale and mode of calculation are as follows: theatres, 6 per cent. of the gross receipts; music-halls 10 per cent. of the gross receipts; dancing-halls, 25 per cent. of the gross receipts.

As to cinemas the Law of 1923 fixes the tariff in this way: if the gross monthly receipts are below 15,000 francs the tax is 6 per cent.; between 15,000 and 30,000 francs it is 10 per cent.; between 30,000 and 50,000 francs it is 15 per cent.; between 50,000 and 100,000 francs it is 20 per cent.; above 100,000 francs the tax is 25 per cent.

In calculating the gross receipts taxes must first be deducted.

(*b*) *The Tax for the Poor* (*Droit des Pauvres*).—This tax in its present shape dates from the Revolution, but it existed under the *ancien régime* and goes back to the beginning of the fifteenth century. The scale is 1/10.

The basis of taxation is the same as that of the State Tax. The Tax for the Poor has preserved its traditional character as a local and special tax. The yield is applied for the benefit of hospitals and agencies providing free medical assistance. The allocation is made in each commune by the prefect. The Tax for the Poor differs in this respect from the State Tax and from the Municipal Tax, as the yield of both these taxes is not specially ear-marked, but falls into the general mass.

(*c*) *The Municipal Tax.*—Authority to levy a tax upon public performances was given to the communes by the Law of June 25, 1920. The scale was left to each commune to fix subject to the approval of the prefect, but a ministerial circular laid down the principle that the tax should never exceed half the sum of the State Tax. Generally speaking, the Municipal Tax varies from 3·60 per cent. to 12 per cent. of the price of the seats. In Paris and its suburbs the Municipal Tax is very low and is frequently not levied at all.

B. Direct Taxes.—Independently of the special taxes on public exhibitions, cinemas are liable to ordinary taxes. We shall say a few words as to these in order to give a complete picture of the fiscal burdens which fall upon the business of carrying on a cinema.

These ordinary taxes are exclusively direct. They are:

(*a*) *La patente.*—This tax was created by the Law of July 15, 1880. In determining its amount account is taken of a certain number of elements, of which the chief are the nature of the occupation and the rental value both of the premises where the business is carried on and of the private residence of the trader.

The *patente* includes a fixed sum varying with the nature of the occupation and also a certain proportion of the rental value of the business premises and place of residence. Under the scale at present

in force a trader who carries on a cinema in a hall of which the rental value is 12,000 francs and occupies an apartment of which the rent is 3,000 francs will pay a *patente*. of 5,668 francs.[1]

(*b*) *Tax on Industrial and Commercial Profits.*—Levied on the net profits of the undertaking, the scale is 8 per cent.

Thus a trader whose net profits for the fiscal year amount to 40,000 francs will be taxed upon this head 3,564 francs.

(*c*) *The Apprenticeship Tax.*—This was instituted in 1925. The scale is 20 per cent. of the total sum paid in cash by the trader for salaries and wages during the preceding year. There is an exemption for persons who have not paid more than 10,000 francs for salaries during the year.

This tax is intended to develop institutions for technical instruction and apprenticeship.

To sum up, a person carrying on a cinema with a commercial rent of 12,000 francs, a residential rent of 3,000 francs, and making an annual net profit of 40,000 francs will pay in direct taxes alone 9,232 francs.[2]

We must add to these the heavy taxes levied on publicity, as, for example, on luminous sky-signs. It will thus be evident how severely the fiscal burdens in France press upon this business.

II. Fiscal Regime as to the Cinematographic Industry, properly so called.

We shall now examine the fiscal burdens which rest, not upon picture houses, but on the business of producing films, whether "virgin" or printed.

A. Direct Taxes.—These are the same as those previously explained, except that we must add the "turnover tax" (*l'impôt sur le chiffre d'affaires*) from which the producers of public performances are exempt. By the terms of the Law of 1920 the amount of this tax varies from 1·10 per cent. to 10 per cent. of the amount realized according to whether the business was in merchandise classified as objects of luxury or otherwise. To this tax after 1924 must be added the *double décime* which raises these taxes respectively to 1·32 per cent. and to 12 per cent. In the Decree of June 28, 1920, relating to the classification of "objects of luxury," we find among objects so classified "photographic apparatus —*objectifs*—above 150 francs." The film apparatus above that value will accordingly be an object of luxury, and subject to the tax at the rate of 10 per cent., whereas the films, screens, apparatus for projection, etc., fall on the contrary into the class of objects taxed at 1·10 per cent.

B. Customs Duties.—The customs tariff on films entering France consists in a single tariff of 20 per cent. *ad valorem*, with a minimum of 0·75 per cent. for positive virgin films, 1·50 per cent. for negative

[1] This figure is taken from the work of M. Billecocq, *Le régime fiscal de l'industrie cinématographique en France.*

[2] Figure taken from M. Billecocq.

virgin films, 2 francs for positive printed films, and 15 francs for negative printed films.

III. Criticism of French Fiscal Legislation.

In coming to the following conclusions we are much indebted to the excellent book of M. Billecocq already cited. No more needs to be said about the direct taxes which apply to the cinema under the general fiscal laws of the country, seeing that these raise no question of principle and do not provoke any protest.

Nor do we need to dwell upon the customs duties. The fact is that the tariff does not afford an effective protection against the competition of the foreign printed film, particularly the American film.

In spite of the amount which the duties add to the cost of production and of the lease of the rights of performance these costs still remain considerably lower than those of the French films.

So far as regards the special taxes imposed upon public exhibitions in general, we are at once struck by the fact that the scale for the cinema is higher than that for the theatre. In creating this difference of treatment the legislator would seem to have been inspired by moral and artistic considerations. But if public authorities assume, as they are entitled and bound to do, the mission of guardians of morals, it is in our opinion not by fiscal legislation but by other means that they ought to proceed. Without doubt a serious danger to society is created by the large number of films, almost exclusively of American origin, which depict acts of violence We have had the opportunity of discussing this serious question with a number of French judges, and they are agreed that this is one of the most important causes of the increase in juvenile crime since the war.

What is needed in order to combat this is an effective censorship, instead of a fiscal system which in a sense penalizes all films, good as well as bad. This is a very complex question which lies outside the scope of this article. We hope to examine it in a later study.

From the purely artistic standpoint we think the legislator is wrong in laying it down as a principle that the artistic value of the cinema is inferior to that of the theatre. It seems to us undeniable that certain films, for example, the " Miracle of the Wolves," have a much greater artistic value than many plays. Moreover, the true reason for this heavy taxation of the cinema is revealed in a declaration by the Minister of Finance in 1920: " In virtue of the vogue which it at present enjoys," he said, " the cinema is in a better position than any of the other ' shows ' to support the weight of this tax."

When we consider that in Paris the average receipts of the cinemas have almost doubled between 1914 and 1923, it is easy to understand why the Minister of Finance should not wish to allow so fine a fiscal prey to escape his clutches.

But the consequence of this high taxation is that in the provinces

where the *clientèle* of the cinemas is restricted both in numbers and in spending power, the cinema is condemned to vegetate and even to disappear. But, according to M. Billecocq, the most regrettable result of these exaggerated taxes is the prejudice which they cause to French producers of films by inducing the lessees of cinemas to supply themselves with films which are cheaper—that is to say, to prefer foreign and especially American films, to French films.

Before the war France saw her films occupying an important place on the screens of the United States. To-day American films are largely exploited in France, while French productions are almost completely excluded from the United States.

The reasons for this state of things, it must be admitted, are not only of a fiscal order. On the contrary, the most important reason lies in the great number of picture-houses—at least 20,000 in the United States. This allows American producers of films to recover their outlays more completely, and more rapidly. The American industry finds a home market of almost unlimited extent, which leaves a wide margin of profit. This allows American films to be leased in Europe at rents relatively moderate. But we must not forget that if the rent of the French film is higher this fact is likewise due to the enormous burden of French taxes upon the cost of production. These taxes in this way destroy the protective effect of the customs tariff.

What conclusions are we to draw from this short study? In the first place it is desirable to reduce the fiscal burdens which rest in France upon the cinematograph. But especially, we must take account of the fact that the crushing advantages which the American industry enjoys owing to the size of its home market are not less serious for the other European countries than they are for France. We agree with M. Billecocq that the best remedy for the insufficiency of national markets would be the formation of a European cinematographic group. The best way to overcome American competition in Europe, and even in the United States, would be by forming a powerful association of this kind, and by the amelioration of the commercial situation of the European film.

FOREIGN CORPORATIONS IN INTERNATIONAL PUBLIC LAW.

II

[*Contributed by* E. H. FEILCHENFELD, ESQ.]

Corporations taking part in the Forming and Exercising of Sovereign State Will.—One of the things which are usually taken for granted is that a corporation can have no status of active citizenship, because "a corporation can owe no allegiance and can be neither loyal nor disloyal." [1]

It is true that a legal entity of rights and activities cannot owe allegiance, but it is usually forgotten that there may be duties of allegiance which are not private but only corporate, *i.e.* "official" duties, and further that it is quite possible that the loyalty which is shown by certain individuals in their corporate and official activity may be quite different from the loyalty or lack of loyalty which such individuals show in private life.

Supposing the East India Company, or the British South Africa Company, had been the Sovereign of a country, then the sovereignty would have been neither the right of an "artificial person" nor the right of a legal entity, but it would have been part of a legal entity of rights which a group of individuals possessed as corporate rights.

It would not even be inconceivable that we might see corporations as diplomatic agents; for instance, in case a small State would entrust with the consular protection of its citizens in a foreign country, a big bank, or another joint stock company. Further, it would be quite conceivable that certain rights of citizenship should be corporate rights; for instance, if the members of a body like the German Federal Economic Council (*Reichswirtschaftsrat*), were elected partly by boards of trades or by private firms and joint stock companies.

Corporations as Objects of International Treaties.—Sometimes the nationality of corporations is expressly fixed by treaties, which seems to be a highly desirable way of settling a matter which international law has, up till now, failed to settle.[2] It must, however, be borne in mind that, by a treaty with several Powers, strictly speaking, no sovereignty is

[1] In this sense Lord Parker in the Daimler case.

[2] Mamelock, *ubi supra*, p. 58, reports an agreement between the Argentine, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay which fixes the administrative centre of corporations as the test of their nationality; the agreement was concluded in 1899 (12.2.); Ruegger, *ubi supra*, p. 46, reports an international conference on financial questions arising out of the Turko-Bulgarian War. For nearer details Ruegger refers to *Le Temps* of July 4, 1913.

acquired, but, instead of something like a *jus in re* against the whole world, only a claim against certain members of the family of nations.

There are many treaties in existence which regulate the recognition and admission of foreign corporations.[1] Such treaties do not decide the question of nationality; they may exclude certain "national" corporations and include certain "foreign" corporations. It is a question of mere interpretation and of the presumed will of the contracting Powers, what corporations are included under a certain treaty, and, if a treaty is not drafted clearly enough in this respect, international law does not contain any fixed rules of interpretation.

It is also a question of interpretation what corporations are included in a commercial treaty, and sometimes whether corporations are included at all.[2]

The position which foreign corporations had before the war in Turkey was quite exceptional, partly on ground of treaties, partly on ground of old customs.[3] The effects of the annexation of a territory are the object of some peace treaties.[4] Lately, it has been the subject of discussion what corporations are included under Article 74 and Article 297, 6 of the Versailles Treaty.[5] As, however, it is the task of this essay rather

[1] Moore, *Digest*, *ubi supra*, iii, p. 800, reporting the application of the convention between Great Britain and the United States of 1794, concerning the security of corporate property; v. Streit in Niemeyer's *Zeitschrift*, Bd. vi (1896), pp. 202 ff, reports treaties concluded by Greece with Belgium, Germany and Italy; Schuster, *ubi supra*, p. 73: "reciprocal recognition is frequently secured by international convention"; reports of treaties concluded by Great Britain with Belgium, France, Greece, Italy and Spain. Liszt, *ubi supra*, p. 105, reports of treaties concluded by Germany with Holland and Sweden. Friedrich Hoffman article, "Gewerbe in internationaler Ausübung," in Strupp's *Wörterbuch des Volkerrechts*, mentions a treaty between Germany and Great Britain concerning admission of corporations of March 27, 1874.

[2] Tribunal Fédéral Suisse, *Clunet*, 1890, p. 518, Swiss corporations not included in a convention concerning "les citoyens Suisses et les sujets Britanniques," Mamelock, *ubi supra*, p. 14, asserts that corporations enjoy the rights which have been secured for Swiss subjects, through commercial treaties, and reports decisions of the Swiss Federal Tribunal holding the same view. Martin Achard, *ubi supra*, p. 9, discusses whether the Franco-Swiss convention of 1869 includes corporations. Barrault in *Clunet*, 1923, p. 236, discusses whether the corporations falling under the Spanish-French convention of 1862 are to be determined by their domicile or by the nationality of their controlling members.

[3] *Cf.* Arminjon, *ubi supra*, Tome I.

[4] *Cf.* above, note 2 p. 99.

[5] Tribunal Mixte Franco-Allemand in *Société du Chemin de fer de Damas Hamah* v. *Compagnie de chemin de fer de Bagdad*, *Clunet*, 1923, p. 595, in *Société anonyme du Charbonnage Frédéric Henri* v. *État Allemand*, *Clunet*, 1923, p. 600, and the case of the *Badische Anilin Gesellschaft*, *Clunet*, 1923, p. 579, hold that the Versailles Treaty has adopted the control theory for the determination of nationality of corporations in the meaning of the above-mentioned articles. The above-mentioned decisions are severely criticized by Neumeyer, and also in *British Year-book*, 1922–23, p. 186 (there also a report of a decision of the Anglo-German Mixed Tribunal holding a different view on the same question), in *Chamberlain Hookham, Ltd.* v. *Solar Zählerwerke*, G.m.b.H.). *Cf.* also H. Isay, *Die privaten Rechte und Interressen im Friedensvertrag*, pp. 44 ff; Cuq, *ubi supra*, p. 132.

to deal with the contents of the *rules* of international law than with the contents of treaties which have been concluded under some such rules, it may only be stated that the control theory does not become international law merely because it has been adopted by one of the Mixed Tribunals which have been established under that treaty.

Corporations as Alien Enemies.—Oppenheim [1] is of the opinion that there are no rules of international law which state clearly under which conditions a corporation may be treated as an alien enemy by a belligerent Power. On the whole, this opinion seems to be perfectly correct.

As is well known, there are two main systems of determining the enemy character of an individual, one of which lays special importance on the nationality of the individual, while the other considers as relevant a number of certain circumstances which are considered as constituting actual connexion with the enemy Power.[2]

If we analyse the points of view which are contained in both doctrines, we find that, according to one or the other doctrine, a belligerent Power may treat as enemies individuals who either—

(*a*) Are subjects of an enemy Power (under permanent legal sovereignty of the enemy); or

(*b*) Have a civic or commercial domicile in an enemy country (under temporary sovereignty of the enemy, and partly or wholly under the actual influence and control of the enemy); or

(*c*) Are wilfully supporting the enemy by certain acts (voluntary supporters of the enemy).

For the purpose of this essay I take it for granted that no other test for determining the enemy character of an individual would be lawful, and further, that any of these three tests, if adopted by a belligerent Power, is in accordance with international law and that, in the absence of fixed rules to the contrary, these systems may be adopted alternatively or cumulatively.[3]

So nationality may be one of the factors which can determine enemy character, but enemy character is not identical with enemy nationality.[4] A national is he who is a subject of a Power, an enemy is he who is exposed by international law to treatment as an enemy. So a person may be a neutral or stateless subject, and in spite of that be exposed to treatment as an enemy.

As to private goods and capital, they share the enemy character of their owner, except in naval warfare, where special customary and

[1] II, s. 88a.

[2] *Cf.* Oppenheim, *ubi supra*, II, pp. 116 *et seq.*

[3] Ruegger, *ubi supra*, p. 21, regrets such cumulations, but does not seem to consider them as unlawful.

[4] *Cf.* Neumeyer, *ubi supra*, and also the decision of the Tribunal civil de Bruges, in *Société Force-éclairage par l'Electricité* v. *Commune de Wenduyne*, *Clunet*, 1923, p. 628: "la mise sous sequestre (as enemy) . . . ne lui fait pas perdre sa nationalité belge," similar; French Cour de Cassation, *Clunet*, 1920, p. 591.

conventional rules are in existence, which, however, owing to their special character are not applicable elsewhere.

With regard to the disadvantages which a belligerent Power may inflict upon individuals, four classes of individuals have to be distinguished:

1. Nationals of the belligerent Power, and individuals without nationality or protection. They are not protected against any kind of treatment from the side of the belligerent Power.

2. Nationals of the enemy State. They are exposed to such measures of the belligerent Power as are not forbidden by the Rules of Warfare.

3. Individuals who are enemies under one of the above-mentioned systems (p. 262), but who are neutral subjects. They are exposed to the same treatment as nationals of the enemy State, but the *jus protegendi* over them is so far stronger as it is the right of a neutral State—a fact which would be of special importance in the case of reprisals which are justified against a certain enemy Power and its subjects, but not against neutrals.[1]

4. Individuals who are subjects of a neutral Power and who are enemies under none of the described systems: they are not exposed to measures which are justified only against alien enemies.

As far as life and health are concerned, there is a great difference between the situation of individuals which fall under the first, and of individuals which fall under the second or the third group.

But, as far as activities and goods are concerned—and for the examination of corporate interests only these interests are in question—there would be no more difference between the first, second and third class, since it seems to be again admitted[2] that, under the *jus strictum* of the Law of Nations, a belligerent Power may completely restrict the activities of an enemy individual by internment and may destroy his property by confiscation. There is nothing more that could be done to the property of its own nationals. Before the treatment of corporations as enemies is discussed, it seems necessary to state clearly what kind of treatment can possibly violate the rights of another State and which treatment cannot, or, as it is usually expressed, what treatment is a question of municipal law only:

1. No right of another State can be violated—and consequently no

[1] For instance, neutral subjects, who are lawfully interned as enemies, would be exposed to the treatment which The Hague Conventions provide for prisoners of war, but they would not be exposed to a measure of justified reprisal which the interning State takes against its enemies under suspension of privileges which are guaranteed by The Hague conventions.

[2] As to the right of confiscation *cf.* such recent writers as Ruegger, *ubi supra*, p. 7, and Mullins in *Transactions of the Grotius Society*, vol. viii, p. 89, who both state the existence of the right of confiscation. On the other hand, the practical importance of the problem is diminished by the fact that, for a long time, the unanimous practice of States has been against confiscation

problem of international public law arises—by a State's treatment affecting activities and property which are the private activities and capital of—

(*a*) Individuals under the permanent sovereignty of the latter State.

(*b*) Individuals not under the protection of any State.

(*c*) Individuals under the exclusive permanent sovereignty and protection of the enemy.

Consequently, it is irrelevant, for the problems of international public law, to ascertain to which of the groups (*a*), (*b*) or (*c*) an individual belongs, as long as there is no doubt that he belongs to one or the other of these groups.

2. Where private activities and rights of individuals under permanent neutral or allied sovereignty and protection are treated as those of enemies the question arises, whether such treatment violates any rights of the home State in respect of them.

As the question what corporations may be treated as enemy corporations seems to be settled neither by universal custom nor by *communis opinio doctorum*,[1] the following remarks are an attempt rather to state clearly the existence and exact extent of a state of legal anarchy than an attempt to frame satisfactory rules of law.

1. The rule that no State can destroy a right or a legal capacity created by the municipal law of another State is to be applied also to war measures (liquidation of corporations).

2. Corporations are never "enemy persons"; the only question is whether corporate property, activities and interests can be treated as those of enemies.

3. Corporate property, etc., is protected against treatment as enemy property only if it is under the recognized protection of a neutral or allied Power; there is reason for the exercise of such protection only when neutral corporate property is unlawfully treated as property of enemy character.

There are three possible justifications for treating property as enemy property under one of the mentioned three systems, namely:

(*a*) Preventing the property from being used for the purposes of enemy warfare by the persons who control it.

(*b*) Punishing somebody for unneutral acts.

(*c*) Making the enemy definitely poorer, and diminishing the sum of his national capital by confiscating for ever property which is under his permanent sovereignty.

The first justification holds good also for neutral corporate property, which is controlled by enemies. Corporate property may not be the private property of the shareholders, and in spite of that, be actually under their permanent control. Corporate property under neutral sovereignty will usually be "enemy controlled" if—

[1] *Cf.* below, pp 265, *et seq.*

1. The persons who actually direct the corporate activities are enemies, and

2. Such persons are not effectively prevented from using their influence in favour of the enemy by the statute of the corporation, or by neutral law, or by acts of a neutral Government.

Such prevention will usually not be operative in case of a trading corporation, but it would, for instance, operate in the case of a pious foundation, the controlling persons of which are enemies, but the statute of which prevents the controlling enemies from using the corporate property for anything else than, let us say, for the support of suffering children.

Whether the second justification holds good in case of neutral corporate property (if the managers have, for instance, used the corporate property for unneutral purposes), is very difficult to decide. Of course, it is clear that the question whether a corporation can commit a delinquency is senseless; the only question is whether corporate interests, property and rights can be held responsible for unlawful corporate acts. This question, again, can only be answered by the positive regulation of a system of law, and it is extremely difficult to say whether international law contains any such regulation, and, if not, whether an enemy Power can hold corporate property responsible or not. An important point seems to be, whether the corporate ends coincide mainly with the personal interests of the members or not. In the former case a punishment affecting corporate property would affect principally the interests of those who are responsible for the unlawful act; in the latter case it might be a great injustice and hardship to let, for instance, the inhabitants of a hospital suffer for an unlawful act which the manager has committed in using the hospital's property.

The third justification would be clearly applicable to neutral corporate property, if such property happens to be under the double permanent sovereignty of a neutral State and of an enemy State, but if such property is under the exclusive permanent sovereignty of a neutral State, that State, I think, could protest, if such property were confiscated, in order to make a belligerent Power poorer.

During the last war the belligerent Powers adopted different systems of determining the enemy character of corporations, which differ somewhat widely from each other [1]:

1. The "English Daimler Doctrine," [2] according to which "a corporation incorporated in the United Kingdom . . . is *prima facie* to be regarded as a friend; but it will assume enemy character . . . if the

[1] Good reports in Pépy, *ubi supra*, pp. 151–204; Garner, *ubi supra*, i, p. 226

[2] 3 T.L.R. 624, *The Daimler Company, Limited v. The Continental Rubber Tyre Company, Limited* [1916] A.C. 307. Reports of the Daimler case, in *Clunet*, 1915, p. 218; Schuster, *ubi supra*, p. 80; Cuq, *ubi supra*, p. 120; Mendelssohn Bartholdy in Strupp's *Wörterbuch des Völkerrechts*. For the American attitude towards the "control doctrine" *cf.* Huberich, *Trading with the Enemy*, p. 63.

persons *de facto* in control of its affairs are . . . resident in an enemy country." The Daimler Company was incorporated in Great Britain, its shareholders were either British or German, its administrative centre was either in England or in Germany, no neutral Power had ever claimed sovereignty over the company, nor was there any imaginable reason for such claim. Consequently, as the corporation was either under no sovereignty or under German or under British sovereignty, the Daimler case was one of those cases with which, as pointed out above, p. 264, international law is not concerned. However England treated the company, she could not possibly violate thereby the rights of any other State.[1]

The same is to be said of English decisions concerning corporations, which were incorporated in Germany, but partly or entirely composed of English members.[2]

Whether English Courts in such cases observed the Daimler doctrine, and whether, by rules of logic or of English municipal law, they were bound to observe it, is entirely a question of English municipal law, with which the international jurist is not concerned.

2. International law is concerned with the Daimler doctrine only in so far as its application could possibly violate neutral or allied rights; for instance, in cases where a corporation was treated as an enemy which either to a great extent was composed of neutral members, or was registered or managed in a neutral country.[3] The Daimler doctrine has been applied to such cases, but it seems doubtful whether it has ever been applied to corporations over which a neutral State had expressly assumed permanent sovereignty.

Of the arguments on which the Daimler doctrine was based and of the discussions which preceded or followed its adoption, two questions are apparently of no interest for the Law of Nations, namely:

1. Whether the Daimler doctrine was inconsistent with earlier decisions,[4] this clearly being only a question of English municipal law.

2. Whether, in the Daimler case, the adoption of the doctrine was unnecessary because the sequestration of enemy shares and the laws against trading with the enemy were a sufficient protection for the national

[1] Decisions of the same character which for the same reason can be excluded from the discussion of international law. *The Polzeath I*, [1916] P. 117; *Clunet*, 1917, p. 285; *The Poona* [1915] B. and C.P.C. 275; *The Tommi*, [1914] P. 251. In all these cases rights of other States could not possibly be violated.

[2] *The Roumanian* [1916] A.C. 1, 124; the Europæische Petroleum Union, which was registered in Germany, was declared as an alien enemy, although its shareholders were partly English.

[3] *The Noordam* [1919] P. 255. The American Express Company, incorporated in Germany, composed partly of Americans, held that American control could not be ascertained, and that the corporation was *prima facie* an enemy company. *The Hamborn*, [1918] P. 19, [1919] A.C. 993; application of the Daimler doctrine to a corporation which was incorporated and managed in Holland, but controlled by Germans. *The Vesta*, [1920] P. 385 similar case as *The Hamborn*

[4] *Cf.* McNair, *ubi supra*, under IV.

British interests.[1] This question is of relevance only for the Daimler case, the discussion of which we have eliminated; but it is of no relevance, for instance, for the decision in the Hamborn case.

Three arguments are of special interest for international law, namely:

1. That a corporation is an entity or a person distinct from the corporators, but that it is the corporators, and not the corporation, which act.[2]

2. That the control of a corporation by enemies is analogous to the domicile of an individual in an enemy country.[3]

3. That a corporation is a mere partnership.[4]

Other doctrines which have been adopted during the Great War are:

1. The " place of incorporation doctrine." " The place of incorporation is decisive for the enemy character." [5]

2. The " trading with the enemy doctrine." " A corporation, even if incorporated in a neutral country, is an enemy if it trades with the enemy." [6]

3. The " shareholder doctrine." " A corporation is an enemy if a certain percentage of its shareholders are enemies." [7]

4. The " Lenzbourg doctrine." " A corporation is an enemy if it is only a " personne interposée," and in reality the firm of enemies." [8]

[1] *Cf.* Lord Parmoor in the Daimler case.

[2] Lord Buckley in the Daimler case.

[3] Lord Parker in the Daimler case.

[4] The Earl of Halsbury in the Daimler case. Baty–Morgan, *ubi supra*, p. 325.

[5] Garner, *ubi supra*, i, p. 226; report of American practice *cf. Janson* v. *Drieffontein Consolidated Mines* [1902] A.C. 484; *Nigel Gold Mining Co* v. *Hoade* [1901] 2 K.B. 849.

[6] Audinet, *ubi supra*, p. 296: " La loi des États Unis déclarait ennemies les sociétés organisées sur le territoire neutre si elles faisaient des affaires avec l'ennemi."

[7] Audinet, *ubi supra*, p. 297, report of Portuguese and Brazilian decrees.

[8] Tribunal civil du Havre, Oct. 2, 1914, *Clunet*, 1915, p. 419, reported utterance of Briand: " Cette décision me paraît de nature à faire jurisprudence "; Lenzbourg case, Cour de Cassation, *Clunet*, 1915, p. 1164, *Clunet*, 1916, p. 494, justification of the Lenzbourg doctrine with the sentence: " *universitas nihil aliud est quam homines qui ibi sunt* "; Société du Casino et des Bains de mer de Cherbourg; Tribunal de la Seine, 1915; *Clunet*, 1916, p. 613; Société du Bouillon Club; Cour de Montpellier, 1916, *Clunet*, 1916, p. 614; Lyon Caen, *Clunet*, 1917, p. 7, against the expression " façade française "; *Société des usines de Barbery* v. *Reymond*, Cour de Paris, 4 ch. July 7, 1916; *Clunet*, 1917, p. 226, points out that up till 1914 the question of the nationality of corporations was solved by principles of private law, while since 1914, for the sphere of public law, the establishment of new principles based on points of view of public law had become necessary; *Clunet*, 1917, p. 231; similar decision, Société des mines nickelifères, *Clunet*, 1917, p. 679; Paul Pic in *Clunet*, 1917, p. 841; Société provençale de Charbon, Cokes et Briquettes, Cour d'Aix, *Clunet*, 1918, p. 277; Société Sopwith, *Clunet*, 1919, p. 688; Société Reifenberg et Cie, *Clunet*, 1920, p. 233; *Clunet*, 1923, p. 322; Feilchenfeld, " Der Lenzbourg Fall," in Strupp's *Wörterbuch des Völkerrechts*.

The Lenzbourg doctrine seems to have been applied by the French tribunals only to companies which were incorporated in France; it seems that it has been hardly applied to "neutral corporations," with one exception, where it has been applied to a company, the administrative centre of which was in a neutral country.[1]

5. The "Suchard doctrine."[2] "A corporation which is incorporated in a neutral country cannot be treated as an enemy if the neutral State certifies the neutral nationality of the corporation." This doctrine has been applied by French Courts to Swiss corporations, with the following two restrictions:

(*a*) Branch establishments of such corporations in France were sequestrated, if they were trading with the enemy.

(*b*) Profits of such corporations, which were in France and were supposed to come into the hands of enemies, were sequestrated.

While the legality of the second restriction seems somewhat doubtful, the first restriction was merely a justifiable exercise of the rights of French territorial sovereignty. Swiss branches which carried on business in France had to comply with the law of the country, and if they did not, for instance if they violated the laws concerning the trading with the enemy, they had to take the risk.

6. The "administrative centre doctrine." "A corporation is an enemy, if its administrative centre is in an enemy country."[3]

7. The "profit doctrine."[4] "A corporation is liable to the disabilities of an enemy if it is managed or controlled from an enemy country, or if the profits have to be paid to an enemy country, even if its administrative centre is in Germany."

All the doctrines which have been summarized on pp. 265–8 are, with the exception of the French Suchard doctrine, municipal methods of dealing with a matter, rather than doctrines of international law.

[1] Cour d'Alger, in the Vulcan Coal Company, the administrative centre of which was stated to be in Holland, *Clunet*, 1915, p. 903.

[2] Société Suchard, Tribunal civil de la Seine, *Clunet*, 1917, p. 225, *Clunet*, 1917, p. 561, report of a discussion of the Suchard case in the French Chambre des Députés, in which the information was given that an intervention of the Swiss Embassy in Paris had taken place; Société de Neuhausen, Cour d'Aix, *Clunet*, 1917, p. 1452, no majority of enemy shareholders stated, held that the corporation was neutral, because its administrative centre and place of incorporation were in Switzerland; Mamelock, *ubi supra*, p. 35, discussion of the Suchard case; Compagnie d'Assurances Nationale Suisse; Tribunal de la Seine, *Clunet*, 1916, p. 1278; Cuq, *ubi supra*, p. 119. The names of the different doctrines, with the exception of the name "Daimler" doctrine, are not yet customary, but only suggestions of the author.

[3] Deutsche Verordnungen, reported in *Curti, Handelsverbot und Vermögen in Feindesland*, p. 88, 90; Cour d'Appel de Rouen in Société la Compania Krische, *Clunet*, 1916, p. 990; Pic, *Clunet*, 1917, p. 841, adoption of this doctrine with restrictions; Schuster, p. 612, under e. Against this doctrine, *cf.* for instance, Tribunal Mixte Franco-Allemand (*Clunet*, 1923, pp. 600, 609), where it is pointed out that the administrative centre of a corporation is of importance only for matters of private and not for matters of public law.

[4] *Cf.* Deutsche Verordnungen *Curti, ubi supra*, p. 84.

As it does not seem that there have been many cases where any of these doctrines have been applied to protected neutral corporations, we have only to examine whether these doctrines would violate the rights of neutral States if they were applied to such neutral corporations.

The different "control doctrines" (Daimler doctrine, Lenzbourg doctrine, Shareholder doctrine), are, in their application to neutral corporations, in agreement with our view as far as the result is concerned, which is, that property of neutral corporations is liable to sequestration, if it is under the control of the enemy. But nearly all the control doctrines take it for granted that a corporation is liable to enemy treatment if the majority of its shareholders or the controlling persons are enemies, while, according to our opinion, such character does not exist in case of a corporation which is controlled by enemies but where there are sufficient guarantees that there will be no corporate activities in favour of the enemy. Further, nearly all control doctrines consider corporations as persons, and treat them as such, while our doctrine only speaks of corporate property. The Suchard doctrine, though far more progressive than the control doctrines, seems to go somewhat beyond what is required by the *jus strictum* of international law, because the *jus strictum* seems to protect not all corporations of certified neutral nationality, but only such corporations which have no enemy character, and over which a neutral protection was already in existence before their neutral nationality was certified by the neutral State.

A corporation which is incorporated in an enemy country is neither necessarily under the sovereignty of the enemy country nor even under its actual control. The place of incorporation doctrine, therefore, seems to run the risk that its application might collide with neutral rights, namely, in the not very probable case that a corporation is incorporated in an enemy country, but controlled only by neutrals and under sovereignty of a neutral Power.

Whether trading with the enemy is a sufficient reason for a belligerent Power, not only to prevent one of its own subjects from trading with such individual (black list system), but to sequestrate the property of such neutral which trades with the enemy seems extremely doubtful. If one answers the question in the affirmative it remains doubtful whether such rule could be applied to corporate property.

The "administrative centre doctrine" seems not to run the risk of illegality if applied to neutral corporations. If a corporation is managed in an enemy country, the corporate property may safely be supposed to be under actual enemy control. If any doctrine is analogous to the determination of enemy character by domicile, then it is this doctrine.

The application of the "profit doctrine" to recognized neutral corporations would be of doubtful validity in so far as it considers payment of dividends to an enemy country as a sufficient test of enemy character.

The sequestration of enemy property is a war measure ; so the Swiss tribunals have rightly held that it would have been a violation of neutrality if Switzerland, during the last war, had lent help to a belligerent Power by handing over to her property which was in Switzerland, and which belonged to Russians whose property had been partly sequestrated by the Germans.[1]

Miscellaneous Questions.—I. The question whether, and how far, corporate capital can be held responsible for illegal corporate activities, which has been treated above, p. 265, arises in the following cases :

1. Acts of espionage, which happen to be corporate activities.
2. Acts of unneutral service and breach of blockade which happen to be corporate activities.

II. Corporations which are under the recognized protection of a third Power, and which are not under the permanent sovereignty of either of the two Powers concerned, seem to be protected against the following measures : 1. Acts of retorsion. 2. Reprisals. 3. Economic boycott inflicted upon a certain State. 4. Taking of hostages and pledges. 5. War measures in occupied territory.

III. There are corporations whose declared object it is to work for governmental purposes, and the rights of which are devoted to governmental purposes. Where this destination is not only a result of the private intentions of the founders, but where this result—as it sometimes happens—is created by a special act of the State, it would not be rash to establish a presumption of international law, that the Government of such State has assumed permanent sovereignty over such corporations, and to state that in case of war their property is, *ipso facto*, enemy property, when found in those countries with which their country is at war.[2]

The character of a corporation which is entirely neutral but for its declared object, which, for instance, may be the support of the enemy in some form, is a question which I should like merely to submit to future discussion.

IV. A trust is usually said to have no nationality of its own.[3] This statement is correct, but not because " an ideal conception can have no nationality," but because a trust usually can be described as some person's private property ; where this is not possible, as, for instance, in the case of the German " Sammelvermoegen," Zitelmann's view[4] seems to be well founded that such capital, which is under a common destination (destined single rights as to be distinguished from legal capacities for acquiring destined rights), has a nationality of its own, or, more correctly, that a distinct sovereignty may be assumed over such capital.

V. A share in a corporation, if held by an individual, is not corporate

[1] *Banque Suisse de Dépôt et de Crédit* v. *Erdmann et Falkenhain*, Tribunal de première instance de Genève. *Cf. Clunet*, 1917, p. 306, 1918, p. 765.

[2] *Cf.* Baty-Morgan, *ubi supra*, p. 263.

[3] *E.g.* Arminjon, *ubi supra*, p. 233. Baty, p. 265: " Ideal conceptions cannot have a nationality."

[4] Zitelmann, *ubi supra*, II, p. 595.

property, and so the question of its nationality and diplomatic protection is outside the subject of this essay.

VI. The fact that a State has a part or the majority of the shares of a corporation does not give such State a recognized sovereignty over the corporation in question, although that fact may enable the State to effect such a transformation of the corporation as might entitle it to impose or confer a recognized nationality on the corporation in question.

In case of war, corporate property which is controlled by the Government of a belligerent Power is the prototype of enemy controlled property.

The only difficult question is whether corporate property, if the shares of the corporation are held by a belligerent Government, is for the purpose of the application of rules on warfare private or public property. A final solution of this question would require an essay of its own, so I prefer merely to submit this problem to further discussion.

Questions of Future Legislation.—During and after the war, the question was frequently discussed in the belligerent countries whether one should and how one could, exclude aliens from founding or taking part in corporations which were incorporated or managed in the different belligerent countries. These discussions mainly concentrated on the problem which was called the " economic invasion by Germany." [1]

Neutrals discussed the problem how they could protect their neutral name against being used by belligerent subjects.[2]

As to the reform of international law, the war problems have hardly led to any new suggestions ; all the existing plans concern the old problems of recognition, admission and of conflict of law.[3]

As to the problems of recognition and admission of corporations, these problems, although legally totally different, are economically and politically closely connected with each other. Recognition of the rights which are devoted to the corporate object is only a measure to make possible the corporate work which the admission allows. So the argument in favour of general recognition and admission of corporations in all countries concerns the problem : " How can corporations be enabled to carry on business and to trade in foreign countries where, up till now, they were not admitted ? "

The general practice of States is in favour of admission and recognition of foreign corporations ; but, at the same time, the modern practice of States is far less favourable to the admission of foreign activities in

[1] *Cf.* Lyon Caen in *Clunet*, 1917, pp 5, 12 ; Pépy, *ubi supra*, p. 249 ; Cuq, *ubi supra*, p. 2, and a most valuable report, pp. 136, 193.

[2] E. Grossmann ; *Wirtschafts-politische Betrachtungen ueber die Staatsangehoerigkeit der Juristischen Personen.* Druckschrift 9 der Schweizerischen Vereinigung fuer Internationales Recht, 1918. Mamelock, *ubi supra*, p. 59 ; Martin Achard, *ubi supra*, p. 43.

[3] Congrès International des Sociétés par actions, 1890 ; Institut de Droit International, 11 annuaire, 1891, p. 171 ; 15 annuaire, 1896, p. 76 ; 16 annuaire, 1897, p. 279 ; Ernst Isay in *Jahrbuch des öffentl. Rechts*, Bd. VIII, 1914, p. 56 ; International Law Association, 23 Report, 1906, p. 253 ; 31 Report, 1923, p. 289 ; Mamelock, *ubi supra*, p. 57 ; Cuq, *ubi supra*, pp. 58–59, 181.

general than it used to be, and, even where it is favourable, the States are very anxious to retain the right to exclude foreign activities at discretion. So I am afraid that the making of an international convention making admission and recognition of foreign corporations obligatory will meet with great difficulties, as long as the new trend of mercantilism is increasing.

The international regulation of the conflict of municipal laws concerning corporations is part of the great problem of international regulation of private international law in general and, its realization is, therefore, subject to the same difficulties as the realization of the rest of that great problem. Generally speaking, it may be said that an individual has, of course, the interest that rights which he has acquired under one system of law may be recognized by all other systems of law too. But it matters comparatively little to corporations whether their legal relations are judged by the law of their administrative centre or by the law of the place of their creation ; what matters to them is that, from and after the time of their foundation, they should clearly know by *which* laws their legal relations will be judged and that their manager need not consult legal experts of two or more countries for new transactions abroad in order to ascertain if the law of their countries is applicable to the transaction in question. As far as the conflict of law is concerned, any international regulation is better than none, and most regulations would be satisfactory.

One important fact seems to have been overlooked in some of the recent discussions on the international regulation of corporation problems :

Since the war, legislation on sequestration, taxation laws and nationalizing laws have taken such forms in some countries as to make very urgent the problem how acquired corporate property can be protected against confiscatory and quasi-confiscatory municipal laws. As matters stand at present, this problem is far more urgent than the problems of recognition and admission of corporations and of the conflict of laws, most of which concern the protection not of acquired property but of the acquisition of property.

This problem forms a part of the general problem of the protection of invested capital abroad. The national advantages and disadvantages of foreign investment have been often discussed, and a somewhat strong, though by no means yet dominant, opinion seems to be arising which is more or less hostile to what is described as " international capital and capitalism." [1]

But, whatever one thinks about the desirability of future investments abroad, there ought to be unanimity that investments which have taken place ought to be protected in international law by new conventions against confiscatory and quasi-confiscatory legislation.

[1] *Cf.* Robert Liefmann, *Beteiligungs und Finanzierungsgesellschaften*, 1909, p. 451 ; C. H. Hobson, *The Export of Capital*, 1914, p. 117 ; H. Withers, *International Finance*, 1916, pp. 110 ff. ; A. Stamfli, *Finanzielle Trustgesellschaften in Reichesbergs Handwörterbuch der schweizerischen Volkswirtschaft*, Bd. III, p. 1684.

As pointed out above (p. 100), many corporations are in the particularly unfavourable situation that they are under no recognized *jus protegendi*. The best way to change this situation seems to me to interest the public opinion of the different countries in the question and to recommend the procedure that: Every State should declare clearly which corporations it considers as its nationals, and should ask other States whether they are willing to acquiesce in its recognition of nationality.

Of all existing nationality doctrines, the "place of incorporation doctrine" seems to have the overwhelming advantage of absolute certainty.

I do not think that such recognition will be often refused. As far as difference of opinions should arise, it is unfortunately improbable that a conference summoned to frame an international convention would lead to the required unanimity.

Anyhow, there seems to be less danger that a clearly declared sovereignty will be disputed, or will fail to obtain the required recognition, than there is danger that States do not take enough interest in corporations which are not of special interest for their national purposes.

It ought to be considered whether for such corporations which cannot obtain an efficient national protection a special international source of protection could not be created.[1]

Annex.—Many of the monographs and judicial decisions on the position of corporations in international law make statements on the character, nature or composition of corporations, and the arguments contained in them are partly based on such statements.[2] But it is not

[1] *Cf.* the suggestions concerning the protection of international associations in Politis, "La Condition Juridique des Associations Internationales," pp. 465 ff, *Clunet*, 1923.

[2] E.g. *Commissioner of Inland Revenue* v. *Samson* [1921] 2 K.B. 492 (a corporation is a legal entity); Cour d'Appel de Rouen in Société la Companhia Krische, *Clunet*, 1916, p. 990; Cour de Paris in Société des usines de Barbourg, *Clunet*, 1917, p. 226; Lord Parker on his judgment in the Daimler case; McNair, *ubi supra*, under I ("a corporation is a person distinct from its members"); Zeballos in *Clunet*, 1906, pp. 605 *et seq* ("a corporation is merely an entity of anonymous capital"); the French Cour de Cassation in a decision of June 1, 1860, reported in Calvo, *ubi supra*, ii, s. 746; Calvo, ii, s. 727; Politis in *Clunet*, 1923, pp. 743 ff; Tribunal Mixte Franco-Allemand in *Société Anonyme des Charbonnages Frédéric Henri* v. *État Allemand*, reported in *Clunet*, 1923, pp. 600 *et seq.*; Lord Halsbury in *Salomon* v. *Salomon* [1897] A.C., 30; Lord Summer, in *The Hamborn* [1919] A.C., 993; Foote, *ubi supra*, p. 126; Rattigan, *ubi supra*, p. 74; Schuster, *ubi supra*, under s. 3; Weiss, *ubi supra*, p. 309; Westlake-Bentwich, *ubi supra*, p. 367, apparently footing on Savigny (Holland); Salmond and other writers on jurisprudence ("a juristic person is a fictitious person"); Young, *ubi supra*, p. 53: Ruegger, *ubi supra*, p. 13, footing on v. Gierke ("a juristic person is a real living body"), a certain sympathy with some points of this theory is shown by Politis in *Clunet*, 1923, p. 476, and Borchard, p. 41; the Earl of Halsbury in the Daimler case [1916] A.C. 515 ("a corporation is a partnership in all that constitutes a partnership except the names and in some respects the position of the managing partners"). Similarly, though less express, already Lord Justice Buckley in the Daimler case [1915] K.B. 216.

J. E. Hogg in *Law Quarterly Review*, vol. 31 (1915), reports two pre-war Australian

universally admitted that such statements are necessary, or of any relevance for the right interpretation of international law.[1]

For the theory which partly underlies the argument of this essay I refer to *Völkerrechtspolitik als Wissenschaft*, pp. 66 ff., and only add here my definition of a corporation :

1. (Three elements, or destination theory). A right usually consists of two elements, " subject " and " object," or better defined in the determination of : 1. *Who* is allowed to do something ? and 2. *What* is he allowed to do ? There may, however, be a third element, which I should like to call " destination," this third element being an answer to the question : 3. For which purpose may the right be exercised ?

If a legal relation, especially a right, contains the destination clause, any exercise of this right beyond its fixed destination would be quite as much *ultra vires* as would be the exercise of a right which belongs to somebody else. A " destination " clause is not : (*a*) An indebtedness towards another person ; the " destination " clause does not oblige the holder of the right to exercise his right, or to work for the destined end, and if the law would oblige the holder of a destined right to work for the destined end such an obligation would be only an obligation towards the law, but not towards another person. (*b*) The creation of a new subject. (*c*) A form of co-ownership, there being no necessity for the existence of any beneficiary owner of the rights bound by " destination," and there being no possibility, for instance, of anyone who could dispose freely of the rights under " destination."

2. A multitude of rights may be called a " legal entity," either because they are the rights of the same individual or because they have the same fixed " destination."

3. A corporation is called into existence when one individual or a group of individuals, whose members are to be determined in future by certain statutory conditions (" membership conditions "), is or are given the capacity to acquire rights (being allowed to do something), or to undergo obligations (being ordered to do or not to do something), these rights and duties comprising either all or only a certain part of the kinds of rights and duties provided by a certain system of municipal law ; with the proviso, that all such rights are only to be exercised for a certain " destination," and with the further proviso that the individuals mentioned above are the subjects of such destined rights and duties only as long as they are members of a simultaneous or successive group fixed by the statute, which contains the " destination."

decisions which hold that although a company, of course, is not a fiction, but a statutory fact, the incorporation only gives a special character and status to the partnership, but does not destroy it. *Clunet*, 1916, p. 490 (" La Société n'est qu'une idée sous laquelle nous concevons l'ensemble des associés ") ; *cf.* also, the report in Cuq, *ubi supra*, pp. 12 *et seq.* The theories of Brinz and Schwarz and the new " disposition " theory of H. C. Dowdall (*Law Quarterly Review*, vol. 37, No. 146 (1921), p. 191), have not yet been adopted by writers on International Law.

[1] Cf. Young, *ubi supra*, p. 15.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Canadian Dissolution.—From the point of view of constitutional usage, June 1926 will always be reckoned among the most important periods of Canadian constitutional history. The ministry of Mr. Mackenzie King, supported uneasily by the aid of the Progressives as described in this *Journal*,[1] was confronted by an attack of unusual force based on the Report of a Select Committee which it had appointed in order to investigate matters of corruption in the administration of the Customs Department. The report, which was the outcome of the governmental determination to probe the malpractices which had grown up in the department and were, it must be admitted, of long standing, made no attack on the Government; but a definite censure was proposed in an amendment moved by an opposition member. The debate was bitter, and on June 25 a Labour attempt to amend the amendment in a non-partisan sense was defeated by 117 to 115 votes; an effort was then made by a Progressive member to move the same amendment as an addition to the original amendment, and the Speaker's ruling declaring this effort out of order was overruled by 118 to 116 votes, while an effort, also by a Progressive, to adjourn the House failed by one vote. These defeats were not, it must be admitted, technically governmental defeats as has been alleged, but they naturally showed that the Government no longer commanded effective support in the House of Commons, and Mr. Mackenzie King proceeded to ask for a dissolution of Parliament.

The Position of the Governor-General.—At this point an absolute divergence of view appeared between the Prime Minister and the Governor-General, between whom hitherto there had existed the greatest personal cordiality. Mr. Mackenzie King, adopting and citing the standpoint for which the writer has consistently pressed,[2] argued that, as the status of the Dominion was admittedly coequal with that of the United Kingdom, the Governor-General should conform to the practice of the King, and should on the advice of his Prime Minister, deliberately given and persisted in, accord a dissolution even if he personally deemed it undesirable.

[1] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. i, pp. 128 f.

[2] See *Imperial Unity and the Dominions* (1916) pp. 97 ff.; *Journal of Comparative Legislation*, New Series, vol. xvii (1917), pp. 227 ff.

Lord Byng, fortified doubtless by colonial precedent and accepting the fact that in law Canada remains a Colony, held that the constitution gave him a personal discretion, and he argued that, as Mr. King had had a chance of governing and had failed to carry on without a dissolution, Mr. Meighen as leader of the Opposition should now be given his chance to carry on. Here was a vital clash of view, based on a fundamental divergence of opinion as to the status of the Dominion,[1] and Mr. King naturally had no option but to resign. Lord Byng's good faith was not for a moment impugned by the Prime Minister, but constitutionally, it cannot be doubted that Lord Byng's action was a retrograde step.[2] It contrasts in the most remarkable manner with that of the Governor-General of the Commonwealth of Australia, Lord Novar, in the period from 1914, when he acted with the utmost fidelity to the doctrine that it was the duty of the Governor-General to assimilate his action to that of the King, and to accept the advice of the Prime Minister. Thus in 1914 he granted a double dissolution of the Houses of Parliament to a ministry which had a majority of one in the lower House, was in a hopeless minority in the upper, and had not the slightest chance of gaining a majority at a General Election. Moreover, Lord Byng's decision had not even the justification that it prevented an election. Mr. Meighen had not the slightest chance of carrying on without a dissolution, and the only issue was whether a dissolution should be given to a Prime Minister who had held office since 1921 without a single defeat, or to an Opposition leader who admittedly would have to obtain a dissolution if he were to be able to maintain himself for a moment.

The Case for the Opposition.—Mr. Meighen's position was rendered specially difficult by the fact that Sir Robert Borden, justly regarded by the Conservatives as a definite authority on Canadian constitutional usage, had already committed himself in the most unqualified manner[3] to the position that the Governor-General must act precisely in the same manner as the King would act in similar circumstances in the United Kingdom. Mr. Meighen, therefore, in defending the Governor-General's action, for which by accepting office on the resignation of Mr. King he became responsible, was compelled to argue that the King would in like circumstances have been at liberty under English usage to refuse a dissolution. This, it may be submitted without the slightest hesitation, is incredible. The mere fact of His Majesty's grant of a dissolution to Mr. Ramsay MacDonald, without even suggesting the possibility of trying to form an alternative Government, is conclusive of the fact that the Crown in the United Kingdom is not be converted into the supporter

[1] See Keith, *Manchester Guardian*, July 8, 1926 (reprinted in Toronto *Star*, July 10); contrast the leading article in *The Times*, July 5, 1926. A curious failure to appreciate the real issue is a marked feature of the British comments on the crisis.

[2] See especially Mr. Mackenzie King's speeches on June 30 and July 1, in the Canadian Commons.

[3] *Canadian Constitutional Studies*, pp. 61 ff.

of any political party.[1] The fact clearly is that Lord Byng acted on the basis of the colonial status of Canada, which Mr. Meighen was thus compelled on taking office to homologate. It must be remembered that this status is attractive to many Canadians, who fear that the fuller measure of national life claimed by others is incompatible with continued association with the Imperial Crown.

The Constitutional Position of Mr. Meighen's Ministry.—Unfortunately for Mr. Meighen, Canada has not yet accepted the practice of permitting Members of Parliament to accept office without re-election, a principle recently and probably most regrettably introduced into the British constitution. He was thus in a position of great difficulty and was compelled to have resort to a subterfuge. By becoming Prime Minister he vacated his seat in Parliament and could not meet the House of Commons, and the same fate would apply to any other persons duly sworn in as ministers. The device followed was probably unique in the annals of the Empire.[2] The Governor-General was advised and consented to accept a temporary ministry composed of seven members who would be sworn in[3] without portfolio and who would assume responsibility as acting ministers of the several departments. On the strength of the advice of this temporary ministry, Orders in Council were issued appointing its members other than Mr. Meighen as acting ministers. Efforts were made in a statement issued on July 6 to prove by statements from the Clerk of the Council and the Deputy Minister of Justice that the proceedings were constitutional. But the attempt is clearly invalid. As I have pointed out,[4] it is legally open to the Governor-General of Canada to remove his ministers at any time, and to replace them by summoning in lieu to the Privy Council, any persons he pleases, and on their advice to exercise all the powers of the Governor in Council of Canada, extensive as these are. But such a proceeding would be entirely unconstitutional, and for the Governor-General to act on the advice of a single minister, and several gentlemen who were bound to vacate their seats if they became ministers and who, in order to avoid this necessity, constituted themselves acting ministers, was a deplorable violation of the Canadian constitution. On July 1 the House of Commons of Canada by a majority of 96 to 95 declared with perfect truth that " the actions in this House of the hon. members who have acted as ministers of the Crown since June 29, 1926, are . . . a violation and an infringement of the privileges of this House for the following reasons : 1. That the said hon. gentlemen have no right to sit in this House, and should have vacated their seats therein, if they legally hold office as administrators of the various departments assigned

[1] See *Journal of Comparative Legislation*, Third Series, vol. vii, pt. i, p. 101. The Crown has not acted independently since 1784.

[2] No real parallel was adduced by Mr. Meighen or his legal advisers. See his speech at Ottawa, July 20, 1926.

[3] Actually no oaths seem to have been administered save that of a Privy Councillor to a new member of the Council.

[4] *Responsible Government in the Dominions*, i, 59 ff., 79 ff.

to them by Orders in Council. 2. That if they do not hold such offices legally they have no right to control the business of government in this House and to ask for supply for the departments of which they state they are acting ministers." Mr. Meighen, in view of this proof of his failure to command the House, procured forthwith the dissolution of the House, without facing it. The mode of procedure was not merely abrupt and discourteous; it defied precedent, for in accordance with the usual practice—which Mr. Mackenzie King had proposed to follow if granted a dissolution—the Governor-General should have met the Houses to prorogue them in the first instance after assenting to such legislation as was ready or could be got ready for assent, and thereafter a dissolution should have been formally proclaimed. As it was the proclamation of dissolution was informally notified through an official, and all the legislative work of the session, not yet completed, was thrown away, inflicting not merely much public inconvenience, but a severe injustice on those private persons whose bills for divorce had been passed but were waiting the royal sanction. Mr. Meighen's assertion that the same procedure was followed as had been proposed by Mr. Mackenzie King must be attributed to some misunderstanding. The legality of the procedure actually followed was questioned by Mr. King, but as usual, a distinction must be made. The mode of action was irregular, informal, and according to all precedent objectionable; but it was not illegal. The power to dissolve, which is given to the Governor-General, can be exercised in any way which results in the Governor-General's intention being communicated to the members of the two Houses, and, however regrettable it may be that a solemn action of this kind, carried out on behalf of the Crown, should be performed in the manner actually adopted, no Court could hold that the notice given was not sufficient to dissolve the Parliament. Nor in all probability did Mr. King intend to express any opinion on the mere matter of law as opposed to constitutional usage.

The Verdict of the Electorate.—It is a matter of great significance for the constitutional development of the Dominions that the people of Canada should by such definite means have declared their disapproval of the Conservative action, the great province of Ontario, the chief source of Conservative strength, having recorded 17 Liberal victories. Mr. Meighen's surrender to Mr. Patenaude on the subject of Canadian participation in British wars weakened seriously his position there, and this disadvantage was enhanced by his adoption of the policy of General Hertzog in the Union of South Africa in demanding that the Canadian preference to the United Kingdom should be revised on a basis of strict reciprocity. As the Canadian preference was granted in its inception free, as a recognition *inter alia* of the value of the British Navy, and of the services of British diplomacy, by Sir Wilfrid Laurier, the new movement assumed an anti-British aspect, which was not welcomed by many in Ontario who desired protection, but had no wish to inflict injury on British trade by cutting off advantages to which it had become accustomed.

An unfortunate effort was made in Ontario during the contest to represent Mr. Mackenzie King as attacking the British connexion, because he disapproved of the exercise of discretion as to dissolution by the Governor-General. Mr. Amery was swift to deny in the House of Commons on July 22 any intervention of the British Government in the matter of the Governor-General's decision, and the election may fairly be held to have settled once and for all for Canada the principle that the representative of the Crown must conform in his actions to the principles followed by the King in regard to his ministers in the United Kingdom. Much confusion was needlessly caused by adduction of parallels from Victoria [1] or Newfoundland, heedless of the gulf which lies between an Australian State, or a tiny Dominion, which has no international status, and a Dominion of vast area, large population and a member of the League of Nations. Further confusion has been generated by efforts to deny that the constitutional issue was seriously pressed in the Dominion, apparently in ignorance of the great indictment of Mr. Mackenzie King at Ottawa on July 23 and his insistence throughout (*e.g.* on Sept. 7), on the vital issue of Canadian status involved.[2] Lord Byng's error, however, may have some advantage for Canada, if the indignation engendered by it has served to assist the Liberal Party to a period of effective government with a secure majority. The great business interests of Canada have insisted, doubtless with truth, that the Dominion has suffered severely of late years from the lack of authority in the Government, arising from the appearance of the Progressive Party as a factor in Dominion politics. The new election is evidence of its virtual extinction, save in the shape of the United Farmers of Alberta, whose outlook is peculiar in many respects, and who have hitherto failed to realize the impossibility of working the system of responsible government save under party conditions.[3] In one matter it may confidently be hoped that there will be gain ; the Liberal Government during the parliamentary debates evinced the strongest desire to deal with the grave question of corruption in the Customs Department, and it now has the necessary strength to attack what is the most deplorable feature of Canadian public life. The contiguity of the United States and the effect of America usage on Canada render the problem of appalling difficulty, and in the long run doubtless real reform rests mainly on a change in public opinion as a whole, which can only be effected with great effort.

Dominion Opinion on the Issue.—As the position of Canada and the

[1] See *The Times*, July 5, 1926. Refusals of dissolution have been frequent in Victoria ; prior to 1926, the Dominion has never known one. Victoria would herself never claim Dominion status.

[2] See also Mr. Rowell's letter to Mr. Robb of July 23, 1926, and the full discussions of the issues by Mr. J. S. Ewart in a series of letters in the press in July and August, in which all the issues are ably reviewed from an independent standpoint, especially *The Citizen*, July 6 and 22.

[3] All the ills of Canada were ingenuously ascribed on June 29 by a member to the party system, and its destruction demanded.

constitutional authority of the Governor-General are under the treaty decisive for the Irish Free State, the maintenance of the attitude of Lord Byng by a popular vote would have had a grave repercussion in that Dominion as well as in the Union of South Africa, where General Hertzog has come forward with the demand for making real the alleged equality of Dominion status in matters internal as well as external, agreeing in this view with the opinions of the Irish Free State Government. The outcome must be held to render the situation easier, and in particular to make it unnecessary to press the matter in Canada. Lord Byng's action stands condemned by the vote of the Canadian Commons on July 1, supported by the definite voice of the country at the General Election, and it may be assumed that the Imperial Government has no illusions as to the guiding lines which it should lay down for Governors-General in future, now that the issue has been definitely decided.

The Appointment of Governors in Australia.—The episode has revived discussion in Canada of the desirability of arranging for the appointment of the Governor-General on the recommendation of the Dominion Government and not merely, as now, with its consent or even on its suggestion. The Irish Free State makes no secret of its determination that it shall choose its Governor-General as it did in the case of the present incumbent of office, and, if Canada desired to follow suit it would be very foolish of the Imperial Government to object. But the matter is complex and there is no general concurrence of opinion in the Dominion on the matter. In the case of the Australian States the proposal of five Labour Governments that in future Governors should be Australian citizens, nominated by the Governments and appointed by the Crown, has inevitably been rejected by the Imperial Government.[1] Any other course was out of the question, seeing that the request was purely party in character, and in each case raised strong opposition from large numbers of the electors. No doubt it was consciousness of the academic character of the proceeding that rendered the arguments adduced by the Labour Premiers on the one hand, and the Attorney-General of Victoria on the other, lacking in reality. The Premiers committed themselves to the doctrine that local Lieutenant-Governors had never been known to act other than impartially, forgetting the appointment of a partisan in Queensland and his action in swamping, on purely party grounds and unconstitutionally, the Upper House of Parliament. The Attorney-General refers to the important Imperial duties of the Governor without specifying them—it would not be easy to do so—and lays stress on the necessity of the action of the Governor in weighing requests for dissolutions and in securing observance of the law. In regard to the first point he makes, without noting its seriousness, the definite—and certainly true—statement that ministers in Victoria do not feel due responsibility as to advising dissolutions and have done so in the confident belief that the Governor would refuse to dissolve, and reminds us that this was the

[1] *Parl. Rep.*, Cmd. 2683.

state of things in 1887.[1] It is regrettable that a state of immaturity excusable then should still prevail in a great territory. As regards observance of law, the principle is hardly of any value, since the approval by the Secretary of State of assent being given to a Bill passed by one House of Parliament only, in flat defiance of every legal principle.[2] But what is still more serious is the omission to remember that Acting-Governors, who are local men, often hold office for prolonged periods, which cannot be reconciled with the theory of the necessity of Governors from overseas, who, as fate has it, are apt to be on leave at critical moments. Incidentally, it is a little difficult to take seriously the Attorney-General's theory that party strife in Canada has not the bitterness of that in Australia, and more difficult to understand why the Governor-General of the Commonwealth should have been the channel of communication of a protest from members of the Queensland Parliament.

Imperial Foreign Policy.—The ratification of the Treaties of Locarno immediately following on the meeting of the League Assembly and the admission of Germany is a matter of great interest in the history of the Empire, for, as a result, there has become effective what was preluded in 1919 but never became actual, a condition of affairs in which the Dominions have formally been relieved from responsibilities which are assumed by the United Kingdom. The device of exempting the Dominions from responsibility under these treaties, unless such responsibility is expressly accepted by their Governments, not Parliaments, had, of course the advantage, *inter alia*, that ratification could be expressed without requiring Dominion sanction. The attitude of the Dominions has already been made clear in the case of the Union of South Africa, of the Irish Free State, and of Canada, where reluctance to accept any responsibility is marked, while Australia and New Zealand incline to accept the British lead on all these issues. On June 21 the Canadian Prime Minister proposed, in moving that the House should express formal approval of the procedure laid down by the Imperial Conference of 1923 regarding the negotiation, signature and ratification of treaties, that the House should record its opinion that "before His Majesty's Canadian ministers advise ratification of a convention or treaty affecting Canada, or signify acceptance of any treaty, convention or agreement involving military or economic sanctions, the approval of the Parliament of Canada should be obtained." The debate, which was not carried to a conclusion, owing to other issues being raised more immediately affecting the position of the Government, was noteworthy for an effort by Mr. King to elicit from Mr. Meighen an explanation of his famous declaration at Hamilton in November 1925[3] as to the necessity of a General Election before any Canadian troops were despatched to assist the Empire in any future war. But both then and during the electoral campaign

[1] Keith, *War Government of the Dominions*, pp. 253 f., 258 f.

[2] See this *Journal*, Third Series, vol. vii, pp. 205 f.

[3] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. 1, pp. 125 f.

Mr. Meighen refused to give any further explanation, though Mr. Rowell, formerly a member of the Coalition Government of Sir R. Borden, protested[1] against an attitude which would paralyse the power of the Dominion to give any effective aid to the Empire in an emergency, and necessitate an election under the most unsuitable circumstances of public feeling. It is, however, clear that Mr. Meighen's attitude endangers the possibility of any Canadian Government venturing to act in an emergency with the same decision as that shown by Sir R. Borden in 1914, and, even more certainly, must prevent the acceptance of obligations under the Locarno Treaties, for acceptance would tie in advance the hands of Canadian statesmen as regards the possibility of refusing aid.

The Dominions and the League of Nations.—The demand of the Free State and the Union for equality in matters external has taken effective shape in the candidature of the Irish Free State for a seat on the expanded Council of the League. What is amazing is that this candidature should have been opposed by the British delegation, for it was made clear from the formation of the League that the Dominions must be regarded as entitled to seek and to obtain, if a majority of votes could be secured, election upon the Council, and General Smuts insisted not merely that the right was real, but that it was likely to become effective at no distant date.[2] It is easy to understand the reluctance of the British delegation against the Irish Free State being the first Dominion to attain this privilege; and the circumstances affecting Canada precluded the possibility of that Dominion standing effectively as a candidate for election, in which case it would certainly have expected to be accorded cordial British support. It must be remembered[3] that the Dominions—or at least, the Free State, the Union and Canada—do not acquiesce in the fundamental principle asserted by the British Government, but in my opinion without warrant, under which matters arising between the constituent parts of the Empire do not fall within the scope of the work of the League. In the case of the Irish Free State, of course, the issue is of special interest, because it has long been contemplated that it may be possible in the event of serious differences with the British Government to secure the discussion of the matter by the League, or the intervention of the Permanent Court of International Justice. There is, however, a doubt whether the Irish Free State yet ranks as a unit for the purpose of membership of the International Court, and whether she is to be reckoned as a signatory of the Protocol, in virtue of the fact that the Protocol was signed before the constitution of the Irish Free State and, therefore, on behalf of the United Kingdom. Great stress has been laid in the Dail on the obscurity of these issues, which in view of the Imperial

[1] He appeared on Sept. 11, for the first time since his service as President of the Council in the Coalition Government, on a Liberal platform to support on constitutional grounds the position of Mr. Mackenzie King.

[2] Keith, *War Government of the Dominions*, p. 156.

[3] See *Journal of Comparative Legislation*, Third Series, vol. vii, pt. 1, pp. 108 f.

Conference need not here be discussed; but it must be noted that as regards internal matters also chaos has been allowed to reign in place of the passing of legislation definitely to establish rules on those matters left in confusion through the vague terms of the Acts of 1922 regarding the Free State. It is not creditable that as late as 1926 nothing whatever has been done to clear up the position of the Irish Free State, *e.g.* regarding the British Nationality and Status of Aliens Act, Part II, and it seems to have come as a shock to the Free State Government to find that it had left the validity of all British patents granted since the foundation of the State in the utmost jeopardy.

The Upper House in New South Wales.—An amusing sequel has to be recorded to the efforts of the Labour Premier of New South Wales to induce the Legislative Council to commit suicide recorded in this *Journal*.[1] The newly made Councillors, as has happened in the past, proved unable to bear the prospect of parting with the glories of their new dignity and the style of "Honourable" which it involves, and when the Bill to abolish the Council came before that body it showed no unseemly haste to dispose of it. A vain effort was made by Sir Joseph Carruthers to contend that abolition was *ultra vires*, a doctrine already dismissed by the Courts in the case of Queensland. But prorogation on January 25 found the Bill still undisposed of, and when on resumption it was moved to restore it to the order paper, the proposal was negatived by 47 to 41 votes. Moreover, the Governor had declined to accept the advice of the Premier to appoint women members to the Council, the intention, of course, being to secure thus a strengthening of the numbers in favour of abolition, and the Premier was not prepared to face the risk of an election to decide the issue between himself and the Governor, resorting instead to the device of sending home the Attorney-General to endeavour to induce the Imperial Government to overrule the Governor, as Mr. Holman on an earlier occasion had persuaded it to overrule Sir G. Strickland. In the meantime the Council showed its value by securing the substitution for the proposal to restore the practice of single-member constituencies, with a simple majority vote, of the system of the contingent vote in elections for the Lower House. It is interesting to note that the preferential voting system has thus proved after a definite trial unsatisfactory even to the Labour Party.

The Commonwealth Referenda.—Little need be said of the fresh failure of the people of the Commonwealth to be convinced of the necessity for the amendment of the Federal Constitution so as to confer greater powers on the Federation. The causes which made expedient in the eyes of Mr. Bruce the renewed effort to extend federal power were chiefly two. In the first place, something approaching chaos has gradually emerged as the result of the conflicting awards as to industrial conditions, made by federal and state authority, for, although federal authority within its limits is paramount, it covers but a portion of the field, as was found when in New South Wales a clash arose between the 48-hour week

[1] Cf. *Journal of Comparative Legislation*, Third Series, vol. viii, pt. 1, pp. 129 f.

enjoined by certain Commonwealth awards and the 44-hour week enacted by the State Parliament. In the second place, during the confusion arising from the seamen's strike, the Federation found itself impotent to secure the termination of the strike, which, originating as it did in matters occurring in England, was not capable of being dealt with effectively by the States, even if the Labour Governments had desired to do so, but which might possibly have yielded to federal intervention had the Parliament and Government possessed wider powers. At any rate, the result of these considerations was the presentation to the Parliament of two Bills to alter the constitution. The first and more vital measure proposed to extend the power of the Commonwealth to conciliation and arbitration for the prevention and settlement of industrial disputes generally, and not merely to those extending beyond the limits of any one State ; it further proposed to authorize the Parliament to set up authorities with powers to regulate and determine the terms and conditions of industrial employment and the rights of and duties of employers and employees, and to deal with trusts and combinations in restraint of trade, trade unions and associations of employers and employees. Later, by agreement with the leader of the Opposition, it was decided to add to the measure a clause giving Parliament full power over corporations, and, thus amended, the Bill passed the Lower House with but two dissentients. The other measure, which proposed to place under Commonwealth jurisdiction the protection of the interests of the public in the case of actual or probable interruption of any essential service, fared very differently, for it was energetically opposed by the Labour Opposition, and carried only by a party vote. At the hands of the electorate, which was compelled under the law to vote for or against the proposals, both Bills fared alike. In New South Wales and Queensland alone was the contest close ; the other States, and Victoria above all, rejected the suggestions as unwise and undesirable. It is clear that the campaign for the two Bills was very badly managed ; that Western Australia and Tasmania owing to their bad treatment by the Commonwealth resented any suggestion of increasing federal power ; and that the fact that the projects resembled so far as the first Bill was concerned proposals formerly sponsored by Labour Governments made them suspect in the eyes of supporters of Mr. Bruce's Government. A constitutional session is promised at Canberra, which is to be next year the home of the Parliament, but there is little sign that Australians share the feeling, so freely expressed in England, that there is urgent need for the overhaul of their Constitution and the strengthening of the central power. Perhaps this favourite theory of English political thought might not be so confidently asserted if it were remembered that after some sixty years the federal power in Canada is not noticeably stronger than it was at its inception. One thing, it is clear, told especially heavily against Mr. Bruce's scheme. He planned, if the Commonwealth was given the powers he desired for it, to entrust the duty of handling industrial matters to a judicial body, asserting that

Parliament was ill-fitted to deal with these questions in detail. However sound the theory, it was anathema to a vast body of Labour opinion, which contemplated as inevitable the establishment of a Court of Governmental nominees representative of employers' views.

The Privy Council and Canada.—Reluctantly, for obvious political reasons, the Privy Council has been compelled in *Nadan* v. *Regem*[1] to admit a principle with which readers of these Notes are familiar,[2] the doctrine that the Judicial Committee Act, 1844, overrides any Canadian legislation repugnant to it, and that accordingly the Canadian enactment which now stands in the Canadian Criminal Code, s. 1025, is *ultra vires* the Dominion Parliament in so far as it attempts to destroy the right of the King in Council to determine criminal appeals from Canadian Courts. The annoyance created by this decision in Canada is explicable on constitutional, but not on legal, grounds. If Canadian lawyers really believed in the validity of the enactment, as seems to have been the case, it must have been due to forgetfulness of the explicit terms of the Act of 1844, which gave statutory effect to the prerogative. The truth is that the Canadian Act originally attacking the power to deal with criminal appeals was dictated by political motives,[3] and that the Imperial Government of the day was content to acquiesce in the measure on political grounds, leaving the validity of the enactment to be fought out in the Courts if the occasion should arise. It was hoped that the issue would not be forced, especially as the well-known reluctance of the Privy Council to act in any sense as a Court of Criminal Appeal strengthened the belief that leave to appeal in criminal cases would as a matter of discretion never be granted in the case of Canada. In point of fact in *Nadan* v. *Regem* leave was duly refused, but some mischief was done by the mere declaration that the power existed, and recent evasion of the issue by the Privy Council shows that their Lordships would have preferred to leave the question unanswered, had this been at all possible. The resulting discussions in Canada, and the recent visit of Lord Darling to the Dominion have shown once more that legal opinion, as opposed to political views in the Dominion, favours retention of the appeal. Even in legal circles, however, there has been some tendency to a clearer recognition of the true value of the appeal, which in the case of Canada lies in the power of the Judicial Committee to deal in perfect freedom from local or racial prejudice with issues deeply affecting the relations of the two nationalities in Canada or of the provinces and the Federation, or of the provinces *inter se*. It is impossible seriously to contend that Canada, which occupies a place in the League of Nations and claims national status, is incapable of producing a Supreme Court to which should be left the decision of such issues as the liability of the Ottawa Electric Railway Co. to a lady who had the misfortune to undergo an

[1] [1926] A.C. 482.

[2] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. 1, p. 132.

[3] The Riel appeal raised the issue in an acute form.

accident when seeking to enter their premises,[1] or the limitation period applying to the claim of a passenger for personal injuries incurred on a street railway in British Columbia.[2]

The Privy Council and the Irish Free State.—Precisely the same impression that private issues are not those for which the Judicial Committee is intended to deal in the case of the Dominions is suggested by the rather bitter controversy in respect of the action of the Committee in granting special leave to appeal in respect to any question involving the interpretation of the land legislation of the Free State.[3] It remains difficult to see why leave was ever granted, but to judge from the explanations offered in the House of Lords by Lord Cave it would appear that he was under the impression that in framing the Treaty of 1921 and the Constitution of 1922 those responsible intended to preserve the right of appeal in matters affecting private individuals in all cases, whether or not constitutional or public matters were involved. As a matter of fact, the position was clearly otherwise. The Treaty provided for the retention of the appeal as in Canada, because it provided in general for the Canadian model being followed in matters affecting relations between the Irish Free State—to give it its later name—and the United Kingdom. The Constitution, which is, of course, subject to the Treaty, dealt with the matter, as the result of representations of the British Government, in two clauses. By one (Art. 66) the right to petition the King in Council for special leave to appeal from a decision of the Supreme Court was expressly asserted; by another (Art. 65) sole authority to determine cases involving the question of the validity of any law having regard to the provisions of the Constitution was conferred on the High Court, and Art. 66, while permitting limitation of appeals from the High Court to the Supreme Court, excluded limitation in cases involving the validity of any law. It is clear, therefore, that the Irish and Imperial Governments were in 1922 willing to contemplate that in all cases not involving the validity under the Constitution of laws the Irish Parliament should have the power to exclude appeals to the Supreme Court and *a fortiori* appeals to the Judicial Committee. It may be admitted at once that, having regard to the overriding power of the Treaty as enacted both by the Irish and Imperial Parliaments, the attempted limitation is *ultra vires* in strict law; but it unquestionably expressed a very wise constitutional principle, namely that the Irish Free State should, if it desired, be allowed to terminate appeals save those involving constitutional issues. Having regard to this understanding, the action of the Free State Parliament becomes intelligible. Adopting a course of procedure which was anticipated by me as proper in advising the late Mr. D. Figgis during the drafting of the Irish Constitution, it was decided

[1] *Letang* v. *Ottawa Electric Railway Co.*, 42 T.L.R. 596.

[2] *British Columbia Electric Railway* v. *Pribble*, [1926] A.C. 466.

[3] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. 1, pp. 132 f.; Act No. 42 of 1923, s. 24; [1925] 2 I.R. 82.

to pass legislation [1] to declare the effect of the land legislation to be that laid down in the decision of the Supreme Court from which it had been decided to allow an appeal. This legislation naturally rendered it impossible to proceed usefully with the appeal, for there was no possibility of the Judicial Committee ignoring the legislative power of the Parliament. Nor would it have been wise to allow the appeal to be heard and determined, and then to have deprived the appellant, if successful, of the fruits of his victory by altering the law to his disadvantage. The indignation excited in the Free State was natural, and certainly not more intense than that shown by the Legislature of Quebec in a famous Act[2] which was aimed directly at a Privy Council decision which unluckily contained an error in fact. One conclusion is inevitable: in the case of the Free State the Judicial Committee should grant leave only in constitutional cases, and as has been suggested, it may well be desirable to reconsider more closely for Canada and even Australia the classes of cases in which leave is conceded, in order to confine the activities of the Committee to that class of cases with which it possesses special qualifications to deal.[3]

Dominion Judges on the Judicial Committee.—Lord Darling has, appropriately enough, revived the suggestion that there should be added to the Judicial Committee salaried Dominion judges, and the Government has committed itself to the adoption of this scheme in respect of India despite the objections of a section of the Indian Legislative Assembly. There is, however, a vital difference between the two cases in the amount and character of the work directly affecting the Dominions and India respectively, and it is not surprising that, since the cessation of the New Zealand experiment of sending a paid judge to represent it on the Committee, no Dominion should have thought it worth while adopting the scheme. Its true place, of course, would be as part of the carrying out of the old but still valuable proposal to create a single Court of Appeal for the whole Empire, including the United Kingdom. Such a measure is logically alone compatible with the alleged status of the Dominions as co-equal partners in the Empire, but since Mr. Hughes's eloquent appeal for it fell flat it appears to have made no headway either in this country or in the Dominions. Legal conservatism on the one hand and the desires of Nationalists to be rid of any semblance of Imperial connexion unite to prevent any progress in this sense, and the comparative success of the High Court of the Commonwealth of Australia in dealing with all constitutional issues has unquestionably weakened the claim that the retention of an Imperial appeal is necessary on this score. Indeed, curiously enough, the chief safeguard of the appeal in Canada is the racial, linguistic, and national particularism of the Province of Quebec.

[1] Act No. 11 of 1926.

[2] Keith, *Imperial Unity and the Dominions*, pp. 375 ff.

[3] If Dominion Legislatures are competent to regulate the affairs of the Dominions without interference from the Imperial Government it is not obvious why Dominion judges should have to be restrained from errors in interpreting them. But the colonial status is hard to eliminate.

Indian and Colonial Divorces.—The impasse in India arising out of the conflict of judicial views referred to in this *Journal*[1] has led to an interesting legislative proposal, fathered by Lord Birkenhead, and destined to confer primarily on Indian Courts, and if desired also on Courts in other parts of the Empire (excluding the self-governing Dominions), power to divorce spouses domiciled in England or Scotland. The Bill contains precautions to secure that this jurisdiction shall only be exercised in cases where real hardship would result in compelling the injured party to resort to an English or Scottish Court. The decision to propose such a measure was rather remarkable, having regard to the emphatic pronouncement once more of the Privy Council in *Attorney-General for Alberta* v. *Cook*[2] in favour of domicil as the sole basis of divorce jurisdiction; but it might be pleaded that, having regard to the long existence of the practice of granting divorces in India under the Indian Divorce Act, No. IV of 1869 without regard to domicil, it was undesirable to leave injured persons without an effective remedy by strict insistence on the rule of domicil. Legally the proposal was made more attractive by treating the jurisdiction as essentially ancillary to that of the English and Scottish Courts, it being requisite that the decrees granted should be registered by these Courts in order to have effect. But an unfortunate error was made in the Bill; fortified by an unguarded opinion from the Scottish Office, Lord Birkenhead determined that, even when dealing with persons of Scottish domicil, the Indian Courts must act according to the principles of the law of England. It was argued that the Indian Courts could not really be expected to make themselves familiar with Scottish law, but, as I vainly warned the India Office, it was impossible to expect Scottish lawyers to acquiesce in this suggestion, and in point of fact, though tardily aroused, by July the whole of Scottish legal opinion had been mustered in complete unanimity against the proposal; it was not even admitted that any case could be made out for according the jurisdiction at all; but in any case it was justly argued that to allow an ancillary jurisdiction to be exercised on the principles of a foreign law was wholly illegitimate, and the demand was made that Scotland should be excluded from the scope of the Bill. An alternative suggestion of the Faculty of Advocates is more surprising; reviving an idea which Lord Watson on behalf of the Privy Council declared in *Le Mesurier* v. *Le Mesurier*[3] to be discredited even in Scotland, it was suggested that Indian Courts might be allowed to grant decrees of divorce where there existed a matrimonial domicil in the sense of a domicil distinct from that of succession, consisting in effect of a considerable period of residence of the spouses in India. This revival of an ancient heresy is happily unlikely to be fruitful.

British Jurisdiction in Protectorates.—Wholly unexceptionable from the point of view of law, but raising serious questions of public policy, is

[1] See *Journal of Comparative Legislation*, Third Series, vol. vi, pt. 4, pp. 207 ff.
[2] [1926] A.C. 444.
[3] [1895] A.C. 517.

the decision of the Judicial Committee in *Sobhuza II* v. *Miller and the Swaziland Corporation, Ltd.*[1] In that case the issue turned on the power of the Crown to expropriate land in Swaziland by Order in Council of November 2, 1907, from the natives as part of a well-meant effort to deal with the reckless folly of the late Umbandine, ruler of Swaziland, who was induced to grant vast concessions to Europeans for very slight consideration, and in any case with a complete disregard of the best interests of his luckless subjects. It is not surprising that his successor should have been anxious to challenge the settlements made by the Crown, but the attempt to do so was legally impossible of success. The Privy Council was bound by the decisions in the famous cases of *Rex* v. *Crewe, Ex parte Sekgome*,[2] and *In re Southern Rhodesia*[3] to hold that, whether in virtue of the Foreign Jurisdiction Act, 1890 or as an act of State, the steps taken by the Crown could not be impugned in a municipal Court, whether or not they were just. To tell the truth, there is something archaic in the insistence that, as in a conquered colony, the Crown possesses over a protectorate by virtue of the prerogative complete authority fettered by nothing save its sense of equity, totally regardless of any assurances given to the sovereign or people of the protected State. The law, however, is clear on this head; but it is difficult to accept the complacent dictum of the Committee that throughout the Empire the tenure of native land is communal. Generalizations of this sort have lost all attraction owing to modern research into land tenure, and, as in the Southern Rhodesia case, it may be feared that much substantial injustice has been, and still is being, committed in the native territories of the Empire by reliance on doctrines of Sir Henry Maine, formed at a time when the abundant mass of precise information now available to guide in the formation of conceptions of land tenure was almost wholly lacking.

British Jurisdiction in Mandated Territories.—In view of its doctrine as to protectorates, it is not surprising to find that the Judicial Committee has the most generous conception of the powers of the Crown regarding mandated territories, especially as the Orders in Council under which the Crown acts are based, as in the case of protectorates, on the wide terms of the Foreign Jurisdiction Act, 1890. In order to augment the water supply of Jerusalem an Ordinance was made by the High Commissioner of Palestine in 1925, empowering him by Order to permit the municipality of Jerusalem to take over the water from certain springs subject to conditions to assure an adequate supply being left to the inhabitants of the place where the springs were. The inhabitants naturally enough objected to the fact that their property was being taken without compensation, and obtained from the Supreme Court an injunction to prevent the municipality taking the water. An appeal was brought to the Judicial Committee,[4] which brushed away the suggestion that no appeal lay, asserting that the jurisdiction exercised under mandate fell under that

[1] [1926] A.C. 518. [2] [1910] 2 K.B. (C.A.) 576. [3] [1919] A.C. 211.
[4] *Jerusalem and Jaffa District Governor* v. *Suleiman Murra*, [1926] A.C. 321.

conferred by the Act of 1890, and that an appeal had been provided for under the authority of the Act in the Palestine (Appeal to Privy Council) Order in Council of October 9, 1924, But the more important issue was one of substance. The Supreme Court naturally accepted the duty of considering whether the Ordinance was consistent with the Constitution, which included the provision that no Ordinance should be repugnant to the terms of the Mandate, and it held that in not providing compensation the Ordinance sinned against Art. 2 of the Mandate which provides that "the mandatory shall be responsible . . . for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion." The Judicial Committee held—not, it may be confessed, very convincingly—that the Court below was wrong on the matter of fact as to the provision of compensation; but that was not the real ground of the judgment. It was laid down that it was no part of the duty of the Court to investigate at the motion of any litigant the legislative or administrative actions of the Government in order to decide whether these actions complied with the Court's view of natural justice, and stress was laid on the fact that no legislation at all would be possible if the term "safeguarding" in the Mandate were read as meaning "preserve intact." The true sense of Art. 2 of the Mandate was held to be given by the last words; it was meant to secure that the mandatory should not indulge in any form of discrimination on racial or religious grounds, and no allegations of such discrimination was made in the case in question. The result is very important. It is clear that the mandatory State, in the eyes of the Judicial Committee, may appropriate without compensation where it thinks fit, provided always that it does not act on racial or religious grounds of discrimination. This is a somewhat startling doctrine, but in the case of mandated territories it must be remembered that they have a possible remedy against oppressive use of the great powers of the mandatory in the shape of appeals to the Mandates Commission of the League of Nations. The resentment somewhat unfortunately shown by the Great Powers in October at the meeting of the League Council has, indeed, resulted in some concession by the Commission; but it appears certain that neither Italy nor Germany as a member of the League will consent to allow the mandatories to exercise their authority without close scrutiny, and in this power of criticism probably lies a very real measure of safeguard against the mandatories carrying to extremes the natural inclination to treat mandates as mere disguised annexations.

British Territorial Waters.—A point of Imperial interest is raised by the decision of Hill J. in *The Fagernes*[1] as to the extent of the civil jurisdiction of English Courts. The issue was raised in respect of the sinking of an Italian steamship in a collision in the Bristol Channel at a place where the Channel is about 20 miles wide. The plaintiffs, whose ship was damaged in the collision, desired to proceed against the Italian owners in the English Court, for the excellent reason that under Italian

[1] 42 T.L.R. 621.

law they would have been unable to secure, in a suit brought there, any compensation, as the alleged offender was sunk. But to do so they had to obtain leave to serve notice of the writ abroad, and the question presented to the Court was whether the case could be brought under that provision of Order XI of the Rules of the Supreme Court which permits the Court to allow service of notice abroad in respect of a tort committed in the jurisdiction. Did the term "jurisdiction" include such a spot as a point in the middle of the Bristol Channel far beyond the three-mile limit? The Court, after noticing the probably erroneous doctrine still appearing in the *Annual Practice* that the jurisdiction of the Court stops at low-water mark, decided to follow the famous dictum of Lord Hale[1] that "that arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner," and the decision in *R.* v. *Cunningham*[2] when it was held that the whole of the inland sea between Somerset and Glamorgan must be held to be within the counties by the shores of which it was bounded. There seems no reason to doubt the justice of the decision, but it is interesting to note that the judge referred to the view of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao*[3] as establishing the doctrine that the bed of the sea within the three-mile limit is the property of the Crown. There is Scottish authority also for this view, but it ought to be noted that the Privy Council in the great cases of the Canadian fisheries[4] expressly declined to commit itself on the nature of the power exercised over the waters of the three-mile limit; that their judgment, which was motived by considerations of international law, appears eminently reasonable, and that the claim of the Crown to ownership can hardly be accepted as sufficiently established by the cases adduced. On the other hand, it appears clear that the territorial waters—as distinct from enclosed waters and territorial bars—must be regarded as within the jurisdiction at least since the Territorial Waters Jurisdiction Act, 1878, which, it cannot be forgotten, is essentially declaratory and which in effect declares that the decision in *R.* v. *Keyn*[5] was not a correct exposition of the laws of England. The new decision is of special interest, because it is essentially based on the common law, and not like the decision as to Conception Bay[6] on international recognition and a statute, or like those on the Moray Firth[7] and the Bay of Chaleurs[8] on statutory provisions binding, even if contrary to International Law and the Common Law, on the Courts.

[1] *De Jure Maris*, i, 1, c. 4.
[2] Bell's Crown Cases, 72.
[3] I.L.R. 39 Madras, 617, 626; the circumstances were special.
[4] *A. G. of British Columbia* v. *A. G. for Canada*, [1914] A.C. 153.
[5] 2 Ex. D. 63.
[6] *Direct United Cable Co.* v. *Anglo-American Telegraph Co.*, 2 App. Cas. 394.
[7] *Mortensen* v. *Peters*, 43 Sc. L.T. 872.
[8] *Mowat* v. *McFee*, 5 Can., S.C. 66.

NOTES.

Charles William Eliot.—The death at ninety-two of Charles William Eliot, for forty years President of Harvard, removes from the American scene one of its most impressive figures. There were few men whose opinions on public matters carried so much weight as his in every part of the Union.

Though he was over eighty at the outbreak of the war and was at that time a private citizen, his able and fearless support of the cause of the Allies was of great value and will not be forgotten.

In 1913 he had been offered for the second time the Ambassadorship to Great Britain, a post which he had declined with regret, thinking himself too old. Of his services to Harvard it is not for an outsider to speak, but it is admitted on all hands that the Harvard of to-day is largely his creation.

The President of a great American University is much more of a public character than university dignitaries with us are apt to be. But it remains astonishing that a man like Eliot, whose life from thirty-five to seventy-five had been devoted to the multifarious affairs of Harvard, should at the same time have been able to acquire so great an influence upon public opinion. No doubt his courage, his honesty, his freedom from political entanglements had much to do with it.

As a member of the Council, he was ever ready to help the work of the Society in which his interest never waned, and on his death the Society loses one of its greatest friends.

His natural dignity—a *gravitas*—which made one think of a great Roman—had in it no trace of pose or pretentiousness.

In his private life he was austerely simple.

Not only was he a firm believer in the principles of democracy, but he had, what is more uncommon, a sympathy which enabled him to deal easily and naturally with all sorts and conditions of men. He was as much at his ease in dealing with plain people as with the rich and powerful.

Of the part he played in public life there can be no more authoritative judgment than that of Bryce quoted in *The Times* of August 24, 1926: "There has not been in our time, either in the United States or in England, anyone who brought to questions which are of the highest significance in the national life a more candid, a more penetrating, a more judicious, and a more wide and comprehensive mind."

The late Sir Paul Vinogradoff.—The portrait of Sir Paul Vinogradoff

which was presented in June 1925 will remain for further generations of Oxford men as a memorial of one of the greatest of those continental scholars, and especially legal scholars, who from Vacarius onwards have found a new home here. "I am not," said Vinogradoff himself in his felicitous speech of thanks, "the first scholar shipwrecked in his own country who has been welcomed to full membership and participation in the rights and in the corporate life of Oxford"; and he went on to express a hope that on his memorial, when the time came, might be inscribed as on that of Vives "*Hospitæ Britanniæ gratus advena.*" The love and gratitude to Oxford of which he spoke were expressed in his work here and in the valuable bequest of his legal and historical library to the Bodleian.

The portrait itself is a good likeness of Vinogradoff as he was in the last months of his life: the expression of acumen and tenacity which never left him is well caught. But to those of his pupils who retain vivid recollections of the first years of his Oxford professorship it is something of a disappointment. Vinogradoff's massive intellect was fittingly housed in a massive frame. Everything about him testified to power and vitality both physical and mental: of this in the portrait there is hardly a suggestion.

Of his immense learning it would be idle to speak. He was, as everyone knows, a proud man,[1] justifiably proud of the harvest of scholarship which he had reaped with unremitting hard labour. But he never made the vulgar mistake of regarding the accumulation of knowledge as an end in itself; and some of us can recollect his indignation at the popular judgment which paid more reverence to the immense private learning of Lord Acton than to Maitland's generous services to his pupils and to the common stock of thought.[2] In his own words about Maine he was "a scholar who before all strove to be a thinker"; his output of historical and legal writing was greater even than is generally realized. His aim was always to place his learning at the disposal of others.

From his pupils he required at any rate some part of his own attitude to learning. He had no use whatever for the purely receptive listener; and *toujours l'attaque* (provided *l'attaque* was carried on with proper respect) was no bad motto for the members of his seminar. But to further and direct the studies of such pupils no trouble was too great for him to take even years after they had left him: he was always interested also in their careers and anxious to further their interests. Correspondence with old pupils and with inquirers all over the world filled a considerable part of his time.

One may perhaps be permitted to hope that space can be found in the forthcoming edition of his *opuscula* for a report of the speech above

[1] But with a vein of modesty sometimes unexpected; *e.g.* his reluctance to tread in the steps of Mommsen.

[2] Of course, this was in no sense a judgment of the two men, but merely a criticism of the popular estimate.

mentioned, a gem of autobiography in miniature. He spoke not only of his feeling for Oxford and for England, but of other great Universities and great men: of the high hopes and ideals which had stirred the students of Moscow in his youth: of his later studies at Berlin; of Maine and Dicey, but particularly of the three whom he reverenced as the greatest with whom he had been brought into intimate contact; Kluchevsky the idealist historian, Mommsen and Maitland. Maitland, of course, was familiar personally or through his work to most of his hearers; Kluchevsky to most of them was barely a name. But "Mommsen was an eagle" whose glance of scrutiny on the unknown young Russian scholar, presenting himself for admission to the seminar, was still vividly remembered after forty years: Mommsen "had so steeped himself in every aspect of the life of Rome that he was an ancient Roman"; and it was Mommsen who spoke to Vinogradoff of the debt which European civilization had owed to various nations in turn, "to Greece, the canons of art and philosophy, to Rome, law," to one nation this blessing, to another that, "and to England, liberty."

"To England, liberty": Mommsen, as Vinogradoff was careful to explain, only summed up feelings that were common all over Europe. Wherever such men as Vinogradoff were confronted with the problem of securing greater liberty with due respect for ancient landmarks, it was to England and to the study of English life they turned for guidance. In Vinogradoff's own case the attraction was felt—if not from the cradle at any rate in the schoolroom. As a boy of twelve he was punished for surreptitiously reading a novel in class—no very unusual occurrence among schoolboys. But the novel was the *Pickwick Papers*, none too easy reading, one would suppose, for a small boy in a Russian provincia town.

Of how great an authority Vinogradoff became on the history of our institutions it would be superfluous to speak. But the impetus which first drove him to English studies was the desire to help forward the progress of Russia: and it was only after the shipwreck of his hopes in this direction that he settled permanently in England. Strange thing though it may seem to say of so distinguished a career, Vinogradoff was to some extent a thwarted man. One side of his character, the zest for administration and organization, never found its full outlet. Those powerful hands and that immense grasp of detail were meant, one could not help feeling, for something sterner than the niceties of scholarship. He should have been a minister of state in a free Russia. It may have been this feeling of opportunity denied which made him perhaps more sensitive than most men to criticism.

Yet, though the fullness of opportunity was denied him, he did achieve some measure of success as an administrator. He took part in the municipal affairs of the City of Moscow, and a leading share in reorganizing its system of public education, particularly its secondary schools. He was the champion of the autonomy of the University of Moscow, and it

was in defence of the students' right to reasonable freedom of discussion that he came in conflict with the obscurantism of the Russian bureaucracy. It was with some amusement that his hearers in 1925 learned of the very moderate freedom of speech which he had demanded in vain for Moscow students: Oxford undergraduates were at the time engaged in moving a vote of censure on the Vice-Chancellor.

To the average Englishman there is very little difference between saying that a man has made shipwreck in his own country and saying that he has been exiled from it. But to Vinogradoff there was all the difference in the world: for he was first and foremost a loyalist and disliked to have it thought that he had any quarrel with the Emperor or sympathy with revolution. His ideal for a Russian constitution left very great and real power in the Emperor's own hands: he believed that, if the poisonous influences which surrounded the throne could be cleared away, all would be well. Every one of the last five Romanoffs had given on occasion striking proof of personal magnanimity; and Vinogradoff in his Cambridge lectures in 1902 gave instances of imperial sympathy with liberal ideals which are not generally known. After he had been some years at Oxford overtures were made him to return to a high post in Russia. On one such occasion the present writer saw him both immediately before he obeyed the Imperial summons and after his return. He was very shaken; he did not speak of his experiences; but his pupils certainly gathered the impression, which I have since had confirmed on good authority, that he had refused high office (of a kind which he desired) because he felt that the prospects of reform were for the moment illusory, and that he was merely asked to join with his old antagonists and become a cog in the bureaucratic regime. At a later date his bent for public affairs found an outlet in his work for the cause of Anglo-Russian friendship. But for a second time his hopes were shipwrecked in the total overthrow of Russian civilization.

The traditions of the Corpus Professorship of Jurisprudence were those of a *liaison* officer between the faculties of law and history, to teach the historian definition and the lawyer perspective, and to inculcate the importance to each of the studies of the other. With the details of English law he was not concerned and he was entirely at liberty to choose his own field in history. Vinogradoff achieved the triumph of acclimatizing in the University which was the home of individual tuition yet a new form of individual tuition. "The seminar system," said an Oxford cynic, "gives professors something to do." But in Vinogradoff's hands it did a great deal more; it brought together under his inspiring guidance a small band of the keener and more efficient members of different faculties capable of approaching the same subject from opposite sides; both undergraduates and graduates of seniority and experience. The *Oxford Studies in Social and Legal History* are one monument of the seminar, the work which is being done by his pupils all over the world is another—*volitat vivu' per ora virum*. At

least one of them has found lessons learned in Vinogradoff's seminar on the *Lex Salica* to have a practical interest in judicial and administrative work in a backward part of India.

His last great work, the *Historical Jurisprudence*, will always remain a *torso* and indeed it would hardly be inaccurate to say that it was conceived as a *torso*, for his reverence for Mommsen led him to exclude from his plan what should perhaps have been the keystone of the whole, the historical jurisprudence of ancient Rome. That being so, one may perhaps be permitted to regret that the closing years of his life were so largely devoted to pre-Roman, and partly even to prehistoric jurisprudence, rather than to the period which the third volume would have covered. In tribal law he was a forcible but intermittent explorer; in the law of the Middle Ages he was an undisputed monarch. The explorer's reports of the realms he has visited, stimulating though they be, are but a poor substitute for the royal ordnance survey of his home domains which he might have had. Of what that survey might have been his published works bear witness; and the pupils of his last seminars, undertaken with a view to it, have some further inkling. But it was characteristic of his Ulysses mind that he should have sought to extend his conquests under conditions of physical health and at a time of life when most men would have been content merely to enjoy what they had already won.

S. G. Vesey FitzGerald.

Conflicts of Jurisdiction in Egypt.—Owing to the existence in Egypt of both Consular and Religious Courts of Personal Statute, conflicts of jurisdiction are not infrequent. No Court to determine conflicts exists.[1] Indirectly, however, the Mixed Courts do in fact serve as a Court of Conflict when some foreign interest arises which gives them jurisdiction. Some interesting recent cases illustrate this procedure.

Pini v. *Pini* (Gaz. Trib. Mixtes XV, No. 40). A contest having arisen as to whether a *de cujus* was an Italian or an Ottoman subject, the Alexandrian Mixed Court (Judge de Herreros) laid down that a Mixed Court is competent to decide on the question of succession where the parties were of different nationalities so far as to determine by which law succession is to be regulated although it is not competent to apply that law.[2] The case was a very peculiar one. The ancestor of the *de cujus* was a Venetian subject who had settled in Egypt before 1745. Numerous points were raised, of which the most important was the effect upon the nationality of a Venetian subject which would result from the abolition of the Venetian State in the time of Napoleon, the

[1] The need for a Court of Conflicts is emphasized and illustrated in the Judicial Adviser's Report for 1900. As to conflicts in Penal questions, see Decree of Organization (Mixed Suits) Chap. II, Art. 23.

[2] The Mixed Courts have long since decided that questions of nationality are not questions of personal status within the meaning of Art. 4 of the Mixed Civil Code.

absorption into Austria of the territory of the ancient republic, and the ultimate national recognition of Venetia as a part of the kingdom of Italy in 1866. The learned judge laid down as a general principle that in Egypt subjects of States having Capitulations could not become Ottoman (or Egyptian) subjects without their own consent. The effect of the cession of territory from one State to another was, he stated, to denationalize the subject of the State residing in the territory ceded, but to preserve the original nationality of the subject of the ceding State residing outside the territory ceded. When, however, a State was entirely destroyed as a result of the cession of the territory, its subjects residing outside became stateless. The reconstitution of the nationality revived the ancient nationality, and in this case it was held that the effect of the Treaty of Vienna of 1866, under which the state of Venice was reconstituted as part of the Kingdom of Italy, gave to the former Venetian subjects who had not acquired Austrian nationality the nationality of the newly constituted State, that is Italy.

Mohamed Tewfik v. *Habib Elias* (Court of Appeal—Gaz. Trib. Mixtes XIV, No. 277). A certain Hanna Banoub, originally a Copt, had been converted to Islam upon marrying a Moslem wife. For twenty years he remained a Moslem, at least in form. Ultimately, however, he returned to his original Christian Community. After his death a contest arose between two groups of heirs and both the Moslem Courts, and the Coptic Patriarchal Courts gave decisions claiming jurisdiction. The question of the validity of these decisions having been raised before the Mixed Courts, in which the claim of a foreign hypothecary creditor was involved, an exception was raised to the competence of the Courts on the ground that the question involved was one of personal statute, and that in accordance with Art. 4 of the Mixed Civil Code the Mixed Court is bound to adjourn any question of personal statute until the competent Court of personal statute could give its decision. The Mixed Court of Appeal, however, held that the question was not strictly one of personal statute but one of public law, seeing that the matter to be decided was whether a conversion to Islam and a reconversion to Christianity were respectively authentic. The Court decided that in the first place, although Banoub's conversion to Islam was probably not a matter of conviction but rather dictated by his desires to marry the Moslem lady, nevertheless, as in form he had become a Moslem, he must be deemed in law to have been a Moslem. As regards his reconversion into Christianity, it was argued that there was a general prohibition on all Moslems to abjure their faith on the penalty of death. The Court was, however, of the opinion that even if that old law should not be regarded as having long fallen into obsolescence in Egypt and consequently to have been impliedly abrogated, it must be assumed that since the promulgation of the Egyptian constitution which distinctly states that in Egypt liberty of conscience is to be absolute, conversion from one faith to another must be permitted. That being so, the reconversion of Banoub should

be treated as valid and the jurisdiction of the Coptic Court should be upheld.

Sakakini v. *Sakakini* (Court of Appeal, February 9, 1926). A dispute arose as to the legitimacy of H. S. who claimed as lawful son a share in the estate of a member of the Sakakini family. The Greek Catholic Patriarchal Court found against the claimant. A revendication based upon the decision of the Patriarchal Court was commenced in the Mixed Courts. It was urged that the Moslem Courts had themselves recognized the jurisdiction of the Greek Catholic Court, the Moslem Court of Appeal having reversed a decision of the Moslem Court of First Instance to the contrary effect. This being so, it was contended that it was not open to the Mixed Courts to doubt the Patriarchal jurisdiction in the matter. In an exhaustive judgment the Mixed Court of Appeal considered the history and limits of the jurisdiction of non-Moslem Courts of personal statute, both in the Ottoman Empire and in Egypt. The conclusion arrived at was that non-Moslem Courts had obligatory jurisdiction in matters of personal status only if all the parties to the suit were members of the Community of the Court. As in this case it appeared that certain claimants were French subjects and Latin, the Greek Catholic Court could have jurisdiction only by consent. In fact these Latin claimants had always objected to Greek Catholic jurisdiction. Consequently the jurisdiction of that Court was ousted and its decrees on the matter in issue were not binding. The result seems to follow that the question of legitimacy of H. S. could only be finally decided by the Moslem Courts in accordance with the Moslem law.

F. M. G.

Native Law and Custom.—One of the objects of the foundation of the Society of Comparative Legislation was the study of native law and custom, and from time to time contributions on the subject have been published in the pages of the *Journal*, though not so often as could be wished in recent years. In the meantime, in different parts of the Empire, excellent journals have been established, in which some attention is given to the subject. To them has now to be added *The Gold Coast Review*, which contains an admirable outline for guidance of those contributing general accounts of tribes or regions, including a questionnaire dealing with civil and criminal law and the judicial organization amongst the tribes. The miscellaneous questions are suggestive. "The Status and Treatment of Widows" would form an interesting subject of research and provide material for an informing comparative study.

The International Education Office.—Based upon the Jean-Jacques Rousseau Institute in Geneva, there has now been founded an International Education Office, of which particulars are given in the July issue of the *Revue Internationale de L'Infant*. Its aim is to become an information bureau about experiments and results in pedagogical science, and to form a link between educationists throughout the world. The

International Education Office does not wish to further the trend of education towards uniformity, and therefore presumably will avoid any action directed towards promoting legislation on similar lines in different countries. It also has no desire to bring direct influence to bear upon the rising generation, but seeks only to give information to those who are directing their education.

International Academy of Comparative Law.—The meeting of this Academy was held in Paris on August 17th and following days.

The French Government gave an official reception to the Academy and they were entertained at a luncheon given by M. Louis Barthou, the Minister of Justice. The beautiful rooms in the Palais Royal occupied by the Institut de Coopération Intellectuelle were placed at their disposal for the meetings, and the greatest kindness was shown to members by the staff of the Institut. Professor W. S. Holdsworth, K.C., was elected as a member of the Academy in room of the late Sir Paul Vinogradoff.

Aviation and Public Health.—Although the use of aviation in the service of the public health does not yet seem to have received attention from the legislature of any country, an article in the *Revue International de la Croix-Rouge*, shows that in Sweden government assistance has been given, and it is clear that a development is taking place under voluntary auspices of considerable value, so that state action may not be far distant. The Canadian Red Cross was able to combat rapidly an outbreak of influenza at Port Yukon with the aid of supplies and assistance sent by aircraft. Similarly doctors and midwives have thus been transported in Australia. Other countries have also made use of aircraft in emergencies requiring prompt medical assistance at a distance from centres of population when they are readily available.

Labour Law in France.—Professors Lambert, Pic and Garraud contribute to the *International Labour Review* (July 1926) a lucid and informing survey of the sources and the interpretation of Labour Law in France complementary to a similar article by Professor Gutteridge, dealing with English Law in the same *Review* (August 1924). The history of the development of a separate body of Labour Law apart from the Civil Code is traced, but to British readers the most interesting portion of the article will probably be the sections describing the effect of judicial practice on legislation. The learned Professors neatly sum up the difference between English and French procedure in the statement :

> The English judge may consider only what the Legislature has said, even though he may be convinced that it has not said what it meant ; whereas the French judge must understand and apply what the Legislature meant, even though the expression given to its thought may be clumsy, incomplete or erroneous.

Other articles in the *Review* illustrate the value of the publication in dealing with problems which confront the countries of the world. Mr. P. W. Martin endeavours to suggest a remedy for overproduction and

underconsumption. Dr. Léon Walther describes some experiments in vocational psycho-physiology, which tabulate the variations in human nature on a statistical basis. The valuable section summarizing reports and inquiries includes an article epitomizing the section dealing with industrial hygiene in the report of the Royal Commission on Health in Australia.

The New Fideicommissum.—Under this title Dr. Ricardo Alfaro, Minister of Panama in the United States, presented a paper to the Third Pan-American Scientific Congress at Lima in November 1924, and he now sends to the Revista de Derecho y Legislacion of Caracas the text of a law, passed by the National Assembly of Panama in January 1925, by which was introduced into the Republic the beginnings of the system of the law of Trusts, adapted from the British law. So far as I know, Panama has the distinction of being the pioneer in this innovation among the independent nations which possess the ordinary "Latin" law of which the Code Civil of the French is the leader and best known. Within our own dominions the law of trusts has been introduced in greater completeness in Trinidad and Tobago (Ordinances 91 and 92), where the Spanish law at one time prevailed; in Ceylon by Ordinance 9 of 1917 (this aims at being a code) where the Roman-Dutch law obtains; and in British Guiana, where the Trustee Act, 1893, was applied by the Civil Law Ordinance of 1917, also a country of Roman-Dutch law. The Quebec law (Civil Code, 3, 2, 4 A. & B.), like that of Panama, confines trusts to gifts by will or *inter vivos*.

The Panama law preserves the existing prohibition of settlements and, as in British Guiana, provides for the remuneration of trustees, who may be either individuals or juristic persons.[1]

WYNDHAM A. BEWES.

Hong-Kong University Law Journal (Vol. i, No. 1).—We wish all success to this venture. It is a promising first number, and if the *Journal* can be maintained at this level it will do much to stimulate the study of law and legal history among English-reading Chinese students.

F. P. W.

Maintenance Orders.—It is officially announced that Orders in Council have been issued extending the Maintenance Orders (Facilities for Enforcement) Act 1920 to Victoria, and to the Federated Malay States (namely, Perak, Selangor, Negri Sembilan and Pahang).

The Act provides for the enforcement in England and Ireland of Maintenance Orders made by a Court in any part of His Majesty's Dominions outside the United Kingdom, or in any British Protectorate to which it extends, and the Legislatures of the State of Victoria and of the territory of Federated Malay States, to which it has now been extended,

[1] *Editorial Note.*—It may be noted that Palestine where the law is eclectic has recently borrowed a good deal of the English Law of Trusts. (*Journal of Comparative Legislation*, vol. viii, pt. iii, p. 232.)

have made reciprocal provisions for the enforcement therein of Maintenance Orders made by Courts in England and Ireland.

The operation of the above-mentioned Order in Council is confined to England and Northern Ireland, and similar provision has not yet been made as regards the Irish Free State by the Government of that State.

Administration of Justice.—It is officially announced that in view of the provisions of Part II of the Administration of Justice Act 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any part of His Majesty's Dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends, the Legislature of New South Wales has made reciprocal provision for the enforcement therein of judgments obtained in the High Court in England, the Court of Session in Scotland, and the High Court in Ireland, and an Order in Council has accordingly been issued extending Part II of the Act to New South Wales.

The operation of the Order in Council is confined to England, Scotland and Northern Ireland, as similar provision has not yet been made in the Irish Free State.

NOTICES OF BOOKS.

ROMAN-DUTCH LAW.[1]

Some eleven years ago Professor R. W. Lee, then Dean of the Faculty of Law at the McGill University, Montreal, published his *Introduction to Roman-Dutch Law*. It was intended primarily for students and also for any other person who might care to have before him a general picture of the Roman-Dutch Law of the present day. At that time, so he tells us, a vision was perhaps floating before his mind of a Roman-Dutch common law, shared by all the countries in which that system then obtained, without being specifically the law of any one of them. But much has happened since then. Professor Lee has himself returned to this country as Rhodes Professor of Roman-Dutch Law at the University of Oxford and in that capacity has perhaps acquired an enlarged realization of the nature and the needs of the students—not yet very numerous—who in this country address themselves to the study of the subject, which he has made his own. Almost all of them come from South Africa. British Guiana has renounced its precious inheritance and has adhered to the English common law in its place. Ceylon presents a picture of "progressive deterioration." Professor Lee notes, not perhaps without a touch of melancholy, that Ceylon has lately adopted the principles of the Married Women's Property Acts in place of the perpetual guardianship of married women of the Roman-Dutch Law. On the other hand, in South Africa the pursuit of the Roman-Dutch Law has acquired increased force and fire. It has been enriched by the active research of distinguished judges and industrious publicists. Those feelings of racial patriotism, which to the annoyance of philosophers will be always breaking into scientific subjects, have seized upon the Roman-Dutch Law and are converting it into a racial palladium.

In Ceylon indeed the Roman-Dutch Law is still there, and is affectionately regarded. An English Attorney-General who proposed to supersede it would receive a very hostile reception. Whenever in a case before the Supreme Court you dig deep enough, you will encounter it, though only within a circumscribed sphere. But seldom, if ever, since the days of Mr. Justice Walter Pereira, has any Ceylon advocate

[1] *An Introduction to Roman-Dutch Law.* By Professor R. W. Lee. Second Edition. Clarendon Press. Pp. 434.

The Jurisprudence of Holland. By Hugo Grotius. The text translated with brief notes and a commentary by Professor R. W. Lee. Vol. i. Text, translation and notes. Clarendon Press. Pp. 531.

thought it worth while to write a book or an article to expound its principles or to dive into its original sources in order to fortify his argument for the purpose of a particular case.

It has become apparent to Professor Lee that any vital force which the Roman-Dutch Law continues to exhibit is to be looked for in South Africa, and in this second edition it has been his principal endeavour to make his book a safe guide to the South African student. A glance down the Table of Cases will show that it consists principally of references to South African reports and that those of Ceylon and the mother-country have only a negligible or at any rate a very subordinate place. References to the reports of British Guiana have been eliminated altogether.

The experience and the history of ten years have enlarged Professor Lee's treatise by some fifty pages. The first edition was the subject of a review in this *Journal*.[1] But it is impossible to notice this second edition without paying a tribute to the admirable qualities which it shares with the first. The combined compression and lucidity of its text are balanced by the richness and animation of its footnotes, a region in which the author has shown himself a master of the art of condensing a disquisition into a paragraph and in which by the fullness and judiciousness of his quotations, extending from the original texts of Justinian through the early Dutch commentators to modern treatises and judgments, he sustains the attention and inspires the confidence of his readers. The book is one which though primarily intended for students is of practical service to both the bar and the bench. As a student's manual it is of special value by virtue of the continuous interest which it excites. It is, indeed, a worthy foundation for the study of Roman-Dutch Law in this country and in the colonies where it prevails.

But a treatise of this character is necessarily only the first stage in the equipment of the student. If the study of the Roman-Dutch Law is to have any value for him at all, he must go to the original sources and it is for the purpose of introducing him to one of the first of these sources that Professor Lee has provided him with a new edition and translation of Grotius' famous *Introduction to the Jurisprudence of Holland* (*Inleiding tot de Hollandsche Rechts-geleertheyd*).

Unquestionably this choice is well justified. No doubt the greatest treatise on the Roman-Dutch Law is Voet's *Commentarius ad Pandectas*. It is complete, voluminous, enthusiastic and inspiring. It has one supreme merit that it carries the student straight to the original sources of the law. Frankly Roman in its outlook, it bases itself upon the Digest of Justinian (as, indeed, its very title implies), and it treats the local Germanic customs rather as derogations from the original revelation than as a framework, the deficiencies of which the Roman Law was called in to supply. Thus it approaches the subject from the point of view of the arrangement of the Digest. The titles of the treatise are for

[1] See *Journal of Comparative Legislation*. New Series, vol. xvi. (no. xxxvi.), p. 387.

the most part the titles of the Digest and are arranged in the same order. Under each of these historic headings the isolated utterances of the Roman jurists are reduced to an ordered and philosophic exposition of the law, taking note of the various qualifications imposed by local custom and discussing the various controversies which had arisen in the learned world of the age.

Voet's method was that pursued by many others of the Dutch jurists. Even now, if one wishes to investigate a point of law, the most convenient method is often to ascertain the title of the Digest under which the point is treated by Voet and then to refer to the observations made under the same title by the other Dutch commentators.

Grotius' treatise is of a very different nature. It was written during his imprisonment in the Castle of Loevenstein, which lasted from June 6, 1619, to March 22, 1621. It was intended not for public circulation but for the instruction of his sons in the laws of their country. It is consequently written not in Latin but in Dutch, a circumstance which will render it specially welcome to Professor Lee's South African hearers. Moreover it cites no authorities but simply gives an authoritative statement of the law. Even its indications of the general sources of the law are extremely meagre. As Professor Lee himself observes, it inevitably leaves the reader in a state of bewilderment as to the nature and content of the Roman-Dutch Law of the present day.

Taken as a whole the work has a certain austereness and severity. The precision of its definitions, its classical conciseness and its general perfection of form to a certain extent detract from its interest. Its object was to instruct the children of the author as to the actual state of the law and, speaking generally, not to satisfy their curiosity as to its origin and growth.

But its scope is not confined to the general principles of law. It includes not only the general Germanic customs, which retained the face of law, but also actual local customs in matters of succession, agriculture and maritime affairs, and when it addresses itself to these subjects it assumes an air of less severity and opens out interesting historical perspectives.

> Meadow or hay-land is apportioned with the scythe on St. Olaf's eve. . . . All colter or plough land is apportioned on the day of St. Peter *ad cathedram*.
>
> Property which is not divisible by parcels must be divided by periods of use; and property which is not divisible must follow the co-proprietor who has the greatest share.

One of the chapters on maritime law opens with an observation which we ourselves read with interest, " the well-being of Holland consists principally in its shipping," and we read later with no less interest that on questions of jettison the master may overrule the supercargo and act on the advice of the majority of his crew, and further :

A member of the crew is bound to put up with one blow from the master but if the master strikes him a second blow, he may defend himself.

The master must give the crew three meals a day and in addition liquor fit to drink; if a man wants to eat or drink at other times he must be satisfied with the bread that he finds in the basket and with standing to drink at the tap.

The account of the procedure on the prosecution of the crime of murder is of special interest.

If complaint was made, the dead body must be present before the court and naked. . . . In course of time, legal proceedings lasting longer than in times of old, . . . it was found good that the hand of the dead should be cut off from the corpse by the next of kin to take the place of the corpse. . . . After which, the complainant having made his call to arms publicly over the grave prepared for the dead, next made his complaint to God in heaven, to the Count of Holland, and to all good folk.

These picturesque customs were, however, in the days of Grotius mainly things of the past. And so in another direction we read that as between noble and commoner " the only remaining distinction relates to hunting hares and rabbits."

Only very occasionally are the severe pages of Grotius enlivened by some quaint expression or touch of unconscious human nature :

Reason teaches us that in this wicked world wrongful acts cannot be prevented except by fear.

The law of nature does not oblige us to seek another man's advantage at the expense of our own.

The female sex is generally colder and more moody than the male sex and less fitted for affairs which require understanding.

There is one touch of conscious humour :

But to check excessive liberality the Roman laws enacted that no gift above the value of 500 *aurei* . . . should hold good, unless it were reported and enrolled. I do not find anything to this effect in our own laws, perhaps because there is no excess of liberality in this country.

It was not, of course, for these occasional picturesquenesses that Professor Lee selected the *Introduction* of Grotius for his students as their first approach to the original authorities. It may be asked whether after all it is the most appropriate possible selection. The chief interest and attractiveness of Roman-Dutch Law, it may be said, do not lie in the Germanic customs which it incorporates but in its connexion with the great original sources of the Roman Law and its adaptation of the principles of that great system of law to the life of the modern world. Would it not then have been possible to select some other work which more freely indicates its sources and puts the student more directly in touch with the original texts? To all this there are several answers.

In the first place account must be taken of the historical significance of the appearance of the work. It was first published in 1631 and from the date of its appearance it became a classic. It was not merely an introduction to, it became the foundation of Roman-Dutch jurisprudence. It was early the subject of commentaries by Groenewegen and Schorer. It inspired one of the great works of van Leeuwen. It is always quoted with profound respect by Voet himself. Later it became the basis of university instruction.

In the second place there is no such alternative work. The immense commentary of Voet (who did not write till two generations after Grotius) could not be compassed by the ordinary student even if it were possible for him to obtain the text or for Professor Lee or anyone else to publish it for him. Even if Voet or parts of Voet were available, Grotius' presentation of the subject is to be preferred. Venerable as are the titles of the Digest, they do not afford the best possible framework for a philosophic exposition of the principles of the Roman-Dutch Law,—whereas Grotius, in a comparatively narrow space, presents the subject as an ordered and comprehensive whole. There is this also to be borne in mind, that the great majority of the students who read Professor Lee's book will probably be more familiar with Dutch than with Latin and will take a legitimate pride in reading the original text of one of the greatest works of a great member of their race.

In the third place this volume after all only represents half of Professor Lee's work. It is Volume One. He has promised us a second volume which shall contain a systematic commentary on the text and which, from the experience of the footnotes to his own *Introduction*, we may be sure will not only make full use of subsequent expositions of the text, as he himself foreshadows, but will also connect that text with its principal source, the great compilations of Justinian.

The book is printed after the manner of the Loeb Classics, with the Dutch text on one side and Professor Lee's translation on the other. One of its most interesting features is the Tables printed in facsimile at the end of the book, in which Grotius himself presented a conspectus of his subject. They will be studied with appreciation at any rate by Professor Lee's Dutch-speaking readers.

It is to be hoped that some day the Clarendon Press may be induced to issue the principal chapters of Voet in a similar worthy form and with a parallel translation. By the help of a syndicate of workers and of the incorporation of existing material this would be a task of manageable compass. Perhaps Professor Lee may yet be inspired to undertake it.

One question we may be allowed to ask in conclusion. What was it that induced Professor Lee to eliminate from the title of the work of Grotius the modest word *Introduction* so long consecrated by history and so to re-entitle it *The Jurisprudence of Holland*?

ANTON BERTRAM.

BACKWARD TERRITORIES IN INTERNATIONAL LAW.

Dr. M. F. Lindley has, with meritorious industry, brought together a large amount of relevant facts in his treatise, on the position of backward territories in International Law.[1] But it may be regretted that he has not chosen to define precisely the limits of his subject and to discuss more fully the vital aspects. The result is that a very large number of interesting topics are touched upon, and in the main rather perfunctorily discussed. The author, for example, is well aware of the numerous and difficult points arising as regards mandates, but his limits and method forbid any detailed investigation such as would contribute something new to the discussion, or indeed any effective setting forth of the arguments for or against the conclusions arrived at, *e.g.* on the possibility of terminating mandates or the status of territory under mandate (pp. 268 f.). Again we have a discussion of the sovereignty as regards mandated territory (pp. 263 ff.), but no recognition that no real purpose is served by efforts to fit new facts into conceptions which were framed to express conditions without real parallel to those brought into being under the Covenant of the League of Nations. Nor, though *Duff Development Co.* v. *Government of Kelantan, Mighell* v. *Sultan of Johore* and *Statham* v. *Statham and the Gaekwar of Baroda*, are duly cited (pp. 194 ff.), does the author endeavour to explain how private international law treats as independent sovereigns Indian princes whose relations to the Crown have, forcibly and with a general concurrence, been denied by the British Government to be within the purview of public international law. The different status as regards public International Law of Hyderabad and Baroda, on the one hand, and Kelantan is worth investigation. Again, it is impossible to treat the recognition of the Monroe doctrine in the Covenant of the League (p. 78) as leaving it open for the United Kingdom to maintain the position of Lord Salisbury in 1895 in the Venezuela dispute, apart altogether from the fact that International Law rests on action as well as on words, and that the British surrender on the Venezuelan issue left Lord Salisbury's denials of the acceptance of the Monroe doctrine somewhat in the position of mere words.

One point is of more general interest. The author has followed others into a difficulty by insisting on the doctrine that International Law cannot recognize the position of a British subject exercising independent sovereignty (p. 88). But there is not the slightest real ground for this dogma, which rests apparently upon a confusion between municipal and International Law, and lawyers of high distinction found not the slightest difficulty in *Duke of Brunswick* v. *King of Hanover* [2] in recognizing that a subject of the British Crown might also be the sovereign of a foreign

[1] *The Acquisition and Government of Backward Territory in International Law*, by M. F. Lindley, LL.D. Longmans, Green & Co., Ltd., 1926. 21*s.* net.

[2] (1843) 13 L.J. Ch. 107, *per* Lord Langdale, M.R.; (1848), 2 H.C.L. 1, 25, *per* Lord Campbell.

State. Against facts of this sort theoretical difficulties are of no great account. It must be added that in the relevant portion of his work the author appears to have overlooked the literature on the subject of state succession.

A. Berriedale Keith.

AERIAL WARFARE AND SHIPPING.[1]

Mr. J. M. Spaight, author of *Air Power and War Rights*, and other works on aerial warfare which constitute thoughtful contributions to this new phase of international law, now goes a step further. He advances the following sweeping theory:

> The whole corpus of maritime law as established by the practice of the wars of the past and endorsed by doctrine and Prize Court decisions is out of date and inadequate. Its day, except as a kind of background, a withheld sanction, is dead and gone.
>
> Another working basis for belligerent interference with neutral traffic must be sought. The Great War showed what that basis might be. It is the basis of *Contract*, of *Special Agreement*.

Such special agreements, he argues, should provide for sea and air power a kind of juridical screen behind which commerce interruption in war can be made absolutely paralysing without being chargeable with illegality. He instances the special agreements made by this country in the war with the meat-packing and other interests in the neutral States from which the central Empires sought supplies.

One result would be, he says, that the constant harrying and diversion of shipping would become unnecessary, the function of the patrols being largely confined to identifying the ships to which free passage has been permitted and stopping the few others.

He urges that sea and air power, working together, can close the seas to all traffic beneficial to an enemy as they have never been closed before; but if that closure were based on belligerent right the whole neutral world would be up in arms for the freedom of the seas.

It is a tempting notion, but might prove too costly. Great Britain paid very heavily for these contracts during the war. It is true, however, that she would have had to pay more heavily still, if, by a series of compromises and concessions, she had not conciliated the powerful trading interests of the United States and averted the threatened rupture of relations with that country.

Mr. Spaight has written entirely from the point of view of British interests in a war in which she is a belligerent, and he refers to the failure of The Hague Commission of Jurists of 1922–3 to make any provision in regard to aircraft operations against merchant shipping. This was due to a sharp difference of opinion between two groups of Powers vitally

[1] *Aircraft and Commerce in War*, by J. M. Spaight. (Longmans, Green & Co., pp. viii. + 111, 6s. net.)

interested, but in the Code adopted by the International Law Association at Stockholm in 1924, the principle was laid down that the same rules of attack, visit, search, and capture of merchant ships by warships should apply to belligerent aircraft, the safety of those on board being the chief *desideratum*. This being the consensus of the best juridical opinion, it is fairly clear that in any future war one of the main duties of military aircraft will be to visit and search neutral vessels for contraband, and a blockade will become effective over a far wider area than hitherto. Thus, the suggestions advanced in Mr. Spaight's latest book, which is closely reasoned and well documented, are worthy of grave consideration.

WILLIAM LATEY.

LEGAL ESSAYS.[1]

This is a garland of essays written in honour of three distinguished teachers of law, Dr. Henry Bond the Master of Trinity Hall, Professor W. W. Buckland and Professor C. S. Kenny, by colleagues, *lato sensu*, and former pupils.

The essays are: *Recent Developments in Conveyancing Law*, by G. G. Alexander; *International Jurisdiction of Courts*, by J. H. Beale; *The Training of a Mediæval Justice*, by W. C. Bolland; *Citation of Statutes*, by C. T. Carr; *The Charitable Foundations of Byzantium*, by P. W. Duff; *Liability for the Consequences of a "Negligent Act,"* by A. L. Goodhart; *The Origin and Historical Development of the Profession of Notaries Public in England*, by H. C. Gutteridge; *The Renaissance in the Laws of Europe*, by H. D. Hazeltine; *The Work of Grotius and of the Modern International Lawyer*, by A. Pearce Higgins; *"According to the Evidence,"* by Edward Jenks; *The Assessment of Penalties in Primitive Law*, by H. F. Jolowicz; *Acquired and Guaranteed Rights*, by J. W. Jones; *Roman Law in Modern Cases in English Courts*, by D. T. Oliver; *On Certain Maxims of Equity*, by Roscoe Pound; *The Local Ambit of a Custom*, by H. E. Salt; and *Misrepresentation in Equity*, by E. C. S. Wade.

It is a handsome, well-printed book, and its value is enhanced by careful indexing.

Works of this kind are less common with us than they are in Germany, where the *Festschrift* is a time-honoured institution. It is a graceful and fitting way of showing honour. This volume contains a number of admirable studies by English and American experts, and we do not envy the lawyer who will not find in it much to interest him.

Charles Lamb says that in his time at Christ's Hospital saints' days were, as they should be, holidays, and he "a little grudged at the coalition of the *better Jude* with Simon—clubbing (as it were) their sanctities together, to make up one poor gaudy-day between them—as an economy unworthy of the dispensation."

[1] *Cambridge Legal Essays*. W. Heffer & Sons, Ltd., Cambridge. Pp. 331. 12*s*. 6*d*.

That is our only complaint about *Cambridge Legal Essays*. We ought to have had three garlands.

All of the essays are instructive and readable.

Perhaps those of Professor Hazeltine and Mr. Goodhart make the widest appeal. Mr. Goodhart argues, we think, successfully, that the test of liability for negligence is whether a reasonable man might have foreseen the consequences which resulted in the damage and might have avoided them by due care. It is not enough to prove that the consequences were " direct." On the other hand, there may be liability though the consequences were not " probable."

The " natural and probable " rule is a will o' the wisp. The *Polemis* case is a stumbling-block (*re Polemis and Furness Withy and Co* [1921] 3 K.B. 560). He follows Professor Terry—whose book by the way, *Leading Principles of Anglo-American Law*, is less well-known in this country than it deserves to be—in his criticism of the *dicta* of Kelly C.B., Channell B. and Blackburn J. in *Smith* v. *London and S.W. Railway* [1870] L.R. 6 C.P. 14.

No doubt, the whole theory of causation in its legal sense is full of difficulty. Much ink has been shed about it in recent years in France and Germany, and those who are interested will find a good review of the controversies in a thesis *La Notion de la Causalité dans la Responsabilité Civile*, by Pierre Marteau, Marseilles 1914.

English juries generally contrive to evade these subtleties.

We now have the authority of the Judicial Committee, if that was needed, for saying that such phrases as " proximate " cause, " direct " cause, " immediate " cause and so forth are not really helpful (*British Columbia Electric Railway* v. *Loach* [1916], A.C. 719).

Similarly, in France, though *cause déterminante* and *dommage direct* are *clichés* perpetually recurring in the judgments, no precise signification is attached to them.

It is settled that a finding by the Courts that the *dommage* is direct or indirect is final. When we read in a judgment that the *dommage* is indirect, this is generally *camouflage*. It means that the Court has reached the conclusion that the case is one in which it would be unjust to make the defendant pay, and that it is convenient to support the decision upon a ground which is not liable to be called in question.

F. P. W.

DAS BOLLWERK DES FRIEDENS.[1]

This volume is a translation of Mr. Heber Hart's book, which, under the title of *The Bulwarks of Peace*, was first published in 1918—the preface is dated in the month of March of that year. Even in those critical hours the author was reflecting on the means by which a just peace—which then seemed so far off—might be maintained by the free

[1] *Das Bollwerk des Friedens*, von Heber L. Hart, K.C., uebersetzt v. Dr. Gustav Walker, Wien, 1926. (Oesterreichische Staatsdruckesei.)

and reasonable co-operation of all civilized States, and in the fifteenth chapter of his book he sketches the outlines of a League of Nations.

It is perhaps somewhat remarkable that eight years later, when the League has passed from the realm of dreams to that of institutions with a history, friends, and enemies, and all the equipment of workaday reality, Mr. Hart's book should have found a translator into German. The explanation must perhaps be sought in the fact that, since the defection of America, German and Austrian friends and apostles of the League look upon England as its principal advocate and defender; and, in default of a more recent work, they welcome the opportunity of making a nearer acquaintance with the work of an English author who combines the technical equipment of a jurist with the convictions of a good European.

Mr. Hart's main theses are that International Law must for ever remain ineffective to secure peace without the assistance of some form of international governing body, or common council; and that in such a council voting power must substantially correspond with the real power of the States represented thereon. These propositions have passed into the common consciousness of Europe; and it is no longer necessary, as it was twenty or even ten years ago, to cry in the wilderness that no community, unless of the most primitive and static kind, can possibly be governed by tribunals alone, without the co-operation of a legislature of some sort.

M. S. A.

ANCIENT LAW IN THE DESERT.[1]

This delightful book, adorned with some agreeable photographs, is of special interest to lawyers, but can be read with pleasure by anyone. It is lucky that among the few Englishmen who know the Bedouin well, there should be one with the author's talent for writing, and, we may add, with his sympathy for the people he describes.

Those who look here for the Arab whom they know on the film and in the *roman passionnel* will not find him. On the other hand, this book may help to correct the impressions about the desert people conveyed in Doughty's *Arabia Deserta*. That masterpiece is full of beauty and colour, but it lacks human sympathy. Doughty was too intolerant. He could not see the good side of these primitive people, and their peculiar humour was thrown away upon him. One cannot imagine him saying, as Mr. Kennett does, "The Bedouin with all his faults is a very lovable person."

Mr. Kennett has spent seven years or more in the Egyptian deserts, living among the Bedouin and performing the varied duties, administrative and judicial, of an officer in what is called the Frontier Districts Administration. It has been his business to study the Bedouin law with care.

[1] *Bedouin Justice*. By Austin Kennett. (Cambridge University Press, pp. 158, 7*s*. 6*d*. net.)

He has had to assist the sheikhs in applying it judicially, and in getting their judgments executed, which is a still more difficult matter.

The great merit of the book is that it does not deal in generalities. The author gives, evidently from his note-book, simple narratives of a large number of actual cases, the facts of which are often amusing as well as instructive. He tells us what arguments were brought forward and what the judges decided.

He describes in the main two groups of tribes, the Bedouin of the Western Desert, who wander about the coastal fringe of the Mediterranean ranging at most 40 miles inland, and the Arabs of the Sinai Peninsula.

The customary law which these tribes follow bears the mark of hoar antiquity. It is refreshing to find *in viridi observantia* practices familiar to students of early law.

The basis of their penal justice is the idea that responsibility is collective. Bloodmoney paid by the tribe of the offender to the tribe of the victim is to come in place of the "eye for an eye." And among some tribes there is an elaborate tariff for death, loss of a limb, wounds of the face and so forth. Feminists will regret that a woman's life is valued, normally, at half that of a man. But the value of a man's life—£300 among some tribes, forty-one camels among others—is for these people a great sum.

One of the main features of Bedouin legal procedure is the Oath of Purgation (referred to in Exodus xxii. 10–11), by which the defendant, backed in serious cases by a fixed number of men of his tribe swears he is innocent. And we still find among the Bedouin, trial by ordeal. Mr. Kennett gives an amusing description of the "Hereditary Holder of the Red-hot Spoon." The manner in which this ancient law comes to be applied in the Egyptian deserts is very curious. It is commonly administered in suits to which both the parties are Bedouin with the sanction and concurrence of government officials. Nevertheless, strictly speaking, it has no place in the legal system of the country. It may be doubted whether any parallel to this state of things can be found.

In principle, the Egyptian Penal Code applies to the desert as well as to the "cultivation." And the Egyptian judges who apply the Penal Code have no more to do with bloodmoney and ordeal by red-hot iron than has a Metropolitan Police magistrate. But we must remember that the Egyptian deserts are about thirty times as extensive as what we call "Egypt," that is the Delta and the long ribbon of the Nile Valley. By far the greater part of this vast territory is desert *sans phrase*. It is only in certain areas where rain sometimes falls that a scanty vegetation affords a meagre and precarious support to the nomads and their flocks. But even these areas are so wide as to make police control impossible. Experience has shown that the only way to catch a criminal is by dealing with the head of his tribe, and that better results are obtained by applying among the Bedouin rules of which they approve than by trying to force upon them a system of law which is to them alien

and unintelligible. Mr. Kennett's opinion that on the whole Bedouin justice works pretty well is entitled to great respect. In his view it will be a misfortune if this *modus vivendi* should come to an end.

We hope the success of this book will encourage its author to write another in which he will tell us more about such things as the religious ideas of the Bedouin, their superstitions and folklore and their customs as to marriage and divorce. It will be a pity if he does not write down his views about these things while his impressions are fresh.

F. P. Walton.

MANDATES [1]

This book, to which Sir Frederick Lugard contributes a Foreword, gives a remarkably clear and interesting account of the operation of the Mandates up to the present time.

It is of course far too early to form an opinion as to the success of this great and novel experiment, but Miss White's comments are marked by moderation and good sense.

The book cannot fail to be useful to all who are concerned with these matters. The facts which it brings together in such a convenient form are dispersed in a mass of reports and bluebooks inaccessible to most people. Miss White explains and discusses the experience gained in the fourteen mandated territories.

To most readers her chapters on Iraq, Syria, Palestine and South-West Africa will be more interesting than those on New Guinea and the Cameroons, but it is convenient to have the facts at hand about all the mandated areas. We particularly commend her account of Palestine.

With a little common-sense and toleration that distracted country might easily enjoy considerable prosperity. As it is its most appropriate motto is *tantum religio potuit suadere malorum.*

It is inevitable and not undesirable that the Mandatory Powers should take different views of their mission.

France has always believed that the best thing she could do for Oriental races under her control was to spread the French language and culture among them.

England, on the other hand, has generally been very indifferent to such means of exercising influence.

If she could secure decent administration and fair play she has been well content. It is by no means certain as yet which policy is the better.

F. P. W.

PUBLIC AUTHORITIES AND LEGAL LIABILITY. [2]

This book, originally a thesis for the LL.D. degree of the University of London, is in its present form a workmanlike treatise on a difficult

[1] *Mandates.* By Freda White. (Published under the auspices of the League of Nations Union. Jonathan Cape, pp. 196. 3*s.* 6*d.*)

[2] *Public Authorities and Legal Liability.* By Gleeson E. Robinson, M.C., LL.D. With an Introductory chapter on "Remedies against the Crown," by J. H. Morgan, M.A. (London, University of London Press. 21*s.* net.)

branch of law which is becoming every day of greater practical importance.

One cannot take a publisher's jacket at its face value, but in this case it is quite just to say that the book will prove useful to Lawyers, Town Clerks and Clerks to Guardians and other public authorities. It bears the marks of careful study of the cases, and if it has not been possible always to extract a very intelligible rule from them, this is not the fault of the author.

In truth there are few parts of our law which are in such a tangled state, and we think every candid reader of this book will lay it down with a sense of humiliation. By no fault of the judges, justice has got strangled in a mesh of technicalities.

Is it in accordance with natural justice that Crown servants may be dismissed at pleasure? Why should a man who sues the Crown have to break through such a maze of entanglements?

Now that the Crown or the State carries on varied businesses on a large scale, why should it be more protected than other traders?

In particular, why should it not be liable in tort?

Do we still admire, as much as Bacon did, the "garland of prerogatives" that encircles the brow of, let us say, the Postmaster-General? Was not Chief-Justice Marshall speaking, as he was wont to do, the language of good sense when he said, "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a citizen."[1]

And is not this true, *a fortiori*, when the State carries on the whole business? If "case does not lie against the Postmaster-General for a banknote stolen by one of his sorters," is it not time it was made to lie?[2]

It is idle to say that the remedy is against the offender. It may be pleasant to sue a fraudulent letter-sorter, but it can seldom be profitable. Why should a man who has a grievance against a Public Authority have to plunge into speculation of so theological a savour as to whether the Authority in question is or is not an emanation of the Crown?

Can it be just that the immunities of the Crown should, as someone says, "have to be discovered at the hazard of expensive litigation"?

Can any words more darken counsel than the distinction in this branch of the law between nonfeasance and misfeasance?

It would be easy to extend the catalogue and to illustrate it from this book.

Professor J. H. Morgan, K.C., whose introductory chapter of 80 pages on Remedies against the Crown much enhances the value of Mr. Robinson's book, says with too much truth, "Our law relating to remedies against the Executive is the most antiquated in the world."

Our brothers in the law, across the Atlantic, will not misunderstand

[1] *Bank of United States* v. *Planters' Bank of Georgia*, [1824] U.S. 9, Wheat, 904, 907.
[2] *Whitfield* v. *Despencer* (*Lord*), [1778] 2 Cowper 754.

us when we say that we might be consoled by the fact that the American law is as bad if not worse. But this malign satisfaction is denied us when we learn that in the United States there is a good chance of drastic reform.

We think Professor Morgan exaggerates a little in calling the subject of Remedies against the Crown an "uncharted sea." Twenty years ago it might fairly have been so described. In recent years the subject has been elucidated by the work of Mr. G. S. Robertson, and valuable articles upon it have been published in England by Professor Holdsworth and Sir Harrison Moore, and in America by Professor E. M. Borchard and Mr. H. J. Laski, to mention only such names as occur to us.

Professor Morgan is on sure ground when he points out the merits from many points of view of administrative law in France and Germany, and his arguments deserve great consideration. His whole chapter is a powerful attack on the English law as it stands, and is calculated to shock our complacency. But we think his strictures on Professor Dicey are unmerited. They sound formidable until one re-reads Dicey, when the criticism appears not a little unfair.

Dicey's famous chapter was first published in 1885, and if we compare the first edition with the eighth and last of 1915, we see with what patient care it has been recast. He is careful to say that he does not aim at giving a general account of the *droit administratif*. He is concerned only with the point that public officials are, in their official characters, not subject to the ordinary tribunals. He distrusts Courts composed partly of officials and applying rules of their own. But so did most Frenchmen. M. Jean Appleton, in his note to *Conseil d'Etat*, 16 *juillet*, 1914, *Dall.* 1920, 3, 1., speaking of the first two-thirds of the nineteenth century, says, *Les particuliers nourrissaient, à l'égard de la juridiction administrative une méfiance profonde.* So did Dicey. The greater part of his chapter is historical, and that French officials led a charmed life, at any rate up to 1870, is certain. It would be easy to cite from French authorities bitter denunciations of the law.

But Dicey was not at all blind to the transformation that had come over the administrative law in the thirty years since his chapter was first published. He says it has "to a great extent divested itself of its arbitrary character," and, indeed, he speaks of the modern law with much admiration (see pp. 377, 395).

Though it does not fall within his scope, he draws attention to the great power—frequently exercised most beneficently—of annulling, on the ground of *excès de pouvoir*, by-laws and other administrative orders. It may be remarked in passing that this function of the Administrative Courts well deserves our study.

Professor Morgan falls foul of Dicey as to the German law. But the most cursory inspection shows that Dicey was not professing to deal with this. There are only one or two casual references in the notes to German law, and these are supported by reference to French writers. Mr. Morgan on p. lvii. refers to the famous distinction between *faute de*

service and *faute personnelle*, which, by the way, the printer obstinately spells with one n. He says that Dicey correctly states that if the wrongful act was a *faute de service*, the administrative courts alone have jurisdiction, and he goes on, " This is true, but it is not at all true to say, as he does, that in the former case (*faute personnelle*) the individual cannot proceed against the State." On the contrary, says Professor Morgan, " he may, as in Germany, proceed either against the individual " (meaning evidently the official), " or against the State at his option." And in a note he says, " This was first laid down by a decision of the *Conseil d'Etat* of 12 *fév.*, 1909, in the case of the *Cie. commerciale de colonisation du Congo français*.

Now, what Dicey says is expressed with characteristic caution. He explains that " in the case of *faute personnelle* the plaintiff must sue the official in the ordinary Courts, and " *apparently* cannot proceed against the State " (p. 394). Mr. Morgan says rather bluntly that this is " not at all true." But, as a matter of fact, Dicey's statement of the French law as it was in 1915 is absolutely accurate, if by the French law we mean, the law laid down by the Courts. Not only so, but the view which he states is in accordance with the opinions of nearly all the writers on *droit administratif*, and, especially, of M. Hauriou and M. Duguit. M. Jèze, it is true, did not agree.

Up to that time the Courts and the authors were continually chanting in unison *point de cumul*. Either the State was liable or the official was liable, but they were never both liable for the same act. Professor Morgan, following M. Jèze, cites the Congo case as marking a new departure. But this is quite a mistake. That was a case not of tort, but of contract. The French Government had granted a concession to the company, and the averment was that the company had been deprived of part of what it had bargained for, owing to the illegal conduct of the military officer in charge of the district in proclaiming martial law without justification. The *Conseil d'Etat* held the State liable and said that it was immaterial whether the fault here was *faute personnelle* or not.

And indeed it would have been very odd if the Government could have justified its breach of contract on the ground that this was caused by the personal fault of its own officials.

The annotator of the report in Dalloz says that the decision in no way contradicts the jurisprudence to the effect that the State is not liable in tort for the personal fault of an official (Dall. 1910, 3, 111).

It is true that three years after Dicey's book was published the *Conseil d'Etat* adopted the new principle that in certain classes of cases which it would take too long to explain here, the same act may be a *faute de service* and a *faute personnelle*.

But Dicey wrote as a lawyer and not as a prophet.

Most English lawyers owe to Dicey their first introduction to *droit administratif*, and it seems right to say so much to defend him against the charge of inaccuracy. As for the rest, we have nothing but commendation of Mr. Robinson's work. F. P. WALTON.

NEGLIGENCE FOUNDED ON RIGHTS.[1]

THE author of this book puts forward a new theory of the law of torts in general and of negligence in particular. It may be doubted whether he has really grasped the magnitude of his task. If a new theory is to be seriously considered, it ought to be consistent with itself; and if it is to be convincing, it ought to fit most of the material to which it is applied. We are not sure whether Mr. Vaz's exposition fulfils the first requisite, and we are quite certain that it falls short of the second. The *clou* of his analysis is a distinction between negative rights and positive rights. "The negative rights involve in themselves the end in view; whilst the positive rights merely create the medium so as to enable the individual to attain his ends if he so desires. When the law provides that one person shall not assault another, this protection provides the right and attains its aim, namely, the immunity from injury. When the law prescribes that a person shall have a right to till his land without interference from another, that right does not of itself attain its end, namely, the growth of crops" (p. 17). Thus the difference between these kinds of rights is based on the shifting sand of the motives of their owners. My right not to be imprisoned and my right not to be deceived are classified as negative rights, presumably because observance of them by other people achieves my motive which, if we understand the author, is to be left unmolested by imprisonment in the one case, and by false representation in the other. But my motive may be something much more than that. If the Ancient Mariner had forcibly detained the wedding guest, that would, of course, have been false imprisonment. But if he had let him go on his way, it does not in the least follow that the guest's motive of attending the wedding would have been gratified, for he might have found the church too crowded to get even standing room in it. In other words, his right not to be imprisoned looks like a positive right quite as much as a negative one. Again, the promoters of a company may fully respect my right not to be deceived, by issuing a perfectly truthful prospectus. Yet my motive of getting ten per cent. on the shares allotted to me may be grievously disappointed. Once again, my right has the aspect of a positive right, not of a negative one. The classification then is not exact to begin with, and it is complicated by the insertion of monopolies, patents, copyright, and easements under the confused heading, "Negative rights arising from the exercise of positive rights" (p. 32). Nor is it pressed home with sufficient vigour, for some of the most difficult torts, like interference with marital relations and maintenance, are left unanalysed.

The remaining five-sixths of the book deal with negligence. It might well have been reduced in length by abridging the copious extracts from judgments in the law reports. Occasionally there are just criticisms of decisions, but on the whole the author does not tell us much that is

[1] *Negligence founded on Rights with a Theory of the Law of Torts based on a Conflict of Rights.* By F. S. Vaz. (Butterworth & Co. (India), Ltd., Calcutta, 1925.)

new except in the way of efforts to force the existing law into the cast-iron theory which he has formed. His definition of negligence (p. 93) is open to every criticism that he passes upon other attempts in the same direction (pp. 2–3), and a statement like, " What is however difficult to conceive is, negligence as a duty " (p. 431), seems to be mere carelessness in expression. We have often thought that *In re Polemis*, [1921] 3 K.B. 560 has been overrated in importance, but we cannot understand why a chapter on remoteness of damage is destitute of any reference to it ; nor is any account taken of *Lloyd* v. *Grace Smith & Co.*, [1912] A.C. 716, or of *Mintz* v. *Silverton*, [1920] 36 T.L.R. 399, in the chapter on a master's liability for the torts of his servants. We are quite unable to accept the suggestion that the final severance of strict liability in tort from qualified liability took place in *Rylands* v. *Fletcher*.

In conclusion, Mr. Vaz states that, " The relation between the several kinds of torts with their common elements and differences have never been expounded " (p. 417). May we recommend to his notice the writings of Sir Frederick Pollock (with whose work on *Torts* he seems to have some acquaintance), Professor Holdsworth and Professor Wigmore, and may we warn him of research in a legal topic that :

> " Only those who know its dangers
> Comprehend its mystery."

P. H. W.

We have to acknowledge :

The Practice of the Privy Council in Judicial Matters. Second Edition. By Norman Bentwich. (London : Sweet & Maxwell, Ltd.) Pp. xxxi + 416. Price £1 15*s.* net.

The British Navy in Adversity. By Captain W. M. James, C.B., R.N. (London : Longmans, Green & Co.) Pp. xviii + 459. Price 25*s.*

Oppenheim's International Law. Vol. ii, Disputes, War and Neutrality. Fourth Edition. Edited by Arnold D. McNair, C.B.E., LL.D. (London : Longmans, Green & Co.) Pp. lv. + 752. Price 42*s.* net.

Modern Theories of Jurisprudence. Vol. i. By K. Basu, M.A., B.L., Tagore Law Lectures, 1921. (University of Calcutta.) Pp. lxi + 575.

History of Land Legislation and Settlement in New Zealand. By W. R. Jourdain. Published by direction of the Hon. A. D. McLeod, Minister of Lands. (Wellington : W. A. G. Skinner, Government printer.) Pp. 248. Price 22*s.* 6*d.*

The English and Empire Digest. Vol. xxix. Inns and Innkeepers ; Insurance ; Interpleader. (London : Butterworth & Co.)

Les Codes de la Russie Soviétique. Translated by Jules Patouillet. (Paris : Marcel Giard.) Pp. iv + 257.

La Nationalité de la Femme Mariée. By Gaston Calbairac. (Paris : Recueil Sirey.) Pp. 342.

Commission Mixte de Réclamations Germano-Américaine. Vol. i. Published by J. C. Witenberg. (Les Presses Universitaires de France. Pp. xv + 147.

Adatrechtbundels. Vol. xxv: Gemengd; Vol. xxvi. Maleisch Gebied en Borneo. ('s-Gravenhage: Martinus Nijhoff.)

Internationales Jahrbuch für Schiedsgerichtswesen in Zivil- und Handelssachen. Published by Dr. Arthur Nussbaum. Band I. (Berlin: Carl Heymanns Verlag.) Pp. vii + 375.

Das Russische Zwischenprivatrecht. By A. N. Makarov. (Berlin: Verlag Hermann Sack.) Pp. 100.

Internationales Privatrecht. By Dr. Ernst Frankenstein. (Berlin-Grunewald: Dr. Walther Rothschild.) Pp. xxviii + 616.

Englische Verfassungsurkunden des 12 und 13 Jahrhunderts. Published by Ludwig Riess. (Bonn: A. Marcus & E. Weber's Verlag.) Pp. 61.

Der Universalgedanke im Recht. By Dr. Jacques Stern. (Berlin: Philo-Verlag und Buchhandlung G.m.b.H.) Pp. 25.

Internationales Verwaltungsrecht. Vol. iii. By Dr. Karl Neumeyer. (Berlin: J. Schweitzer Verlag.) Pp. v + 300.

Le Scuole di Notariato in Italia. By Not. Anselmo Anselmi. (Viterbo: Stab. Tip. G. Agnesotti.) Pp. 35.

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